No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

JOINT APPENDIX

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SUPREME COURT OF WISCONSIN

2015AP304-CR

State of Wisconsin

v.

Gerald P. Mitchell

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
2/10/2015	Notice of Appeal filed in Cir. Ct.
2/13/2015	Notice of Appeal & Court Record
5/13/2015	Brief of Appellant Filed By: Linda Schaefer
8/14/2015	Brief of Respondent Filed By: Michael Sanders
10/2/2015	Reply Brief Filed By: Linda Schaefer

5/17/2017	Opinion/Decision Judge Panel: Hagedorn, Neubauer, Reilly Opinion: Certification Decision: Certification Filed Pages: 14 Order Text: This case raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.

5/17/2017	Certification Filed Filed By: Unassigned District 2 Submit Date: 5-22-2017 Decision: (G) Grant Decision Date: 9-11-2017 ORD the certification is granted and the appeal is accepted for consideration of all issues raised before the court of appeals. When this court grants direct review upon certification, it acquires jurisdiction of the case, Wis. Const. art. VII, 3(3), that is, the entire appeal, which includes all issues, not merely the issues certified or the issue for which the court accepts the certification. Stat v. Stoehr, 134 Wis. 2d 66, 70, 396 N.W.2d 177 (1986); Wis. Stat. 808.05(2) and (Rule)809.61. Further, the court has jurisdiction over issues not certified because the court may review an issue directly on its own motion. Wis. Stat. 808.05(3); and FRO that within 30 days after the date of this order the appellant must file either a brief in this court or a statement that no brief will be filed; that within 20 days of filing, the respondent must file either a brief or a statement that no brief will be filed; and that if a brief is filed by the respondent, within 10 days of filing, the appellant must file either a reply brief or a statement that no reply brief will be filed; and FRO that in any brief filed in this

	court the parties shall not incorporate by reference any portion of their court of appeals' brief; instead, any material upon which there is reliance should be restated in the brief filed in this court; and FRO that in the event any party elects not to file a brief in this court, the briefs previously submitted by that party to the court of appeals shall stand as that party's brief in the Supreme Court; and FRO that within the time period established for the filing of the briefs, each party must provide the clerk of this court with copies of the briefs previously filed on behalf of that party in the court of appeals. If a party elects to file a new brief(s), 10 copies of their court of appeals brief(s) must be provided. If a party elect
10/25/2017	First Brief-Supreme Court Filed By: Linda Schaefer Comment: Please note the party designation on the caption was corrected on the covers of all briefs. Please use the above caption on all future briefs. Appendix to First Brief-Supreme Court
11/21/2017	Response Brief-Supreme Court Filed By: Ryan Walsh Comment: Separate Appendix

12/15/2017	Reply Brief-Supreme Court Filed By: Linda Schaefer Comment: Please note that the form and length certification pursuant to Rule 809.19(8)(d) has been corrected in this brief.
12/15/2017	Brief of Amicus Curiae-MADD Filed By: (St. John, Kevin) Comment: Mothers Against Drunk Driving
7/3/2018	Opinion/Decision Judge Panel: Roggensack, Abrahamson, Bradley, Ziegler, Gableman, Bradley, Kelly Opinion: Opinion Decision: Affirmed Pages: 30 Written by: Roggensack, Patience Drake Abrahamson, Shirley S. Joined Dissenting Opinion Bradley, Ann Walsh Wrote Dissenting Opinion 11 pages. Bradley, Rebecca Grassl Joined Concurring Opinion Kelly, Daniel Wrote Concurring Opinion 12 pages. Order Text: The judgment of the circuit court is affirmed.

CIRCUIT COURT, SHEBOYGAN COUNTY, WISCONSIN

13 CF 365

State of Wisconsin

v.

Gerald P. Mitchell

RELEVANT DOCKET ENTRIES

Date Filed	Docket No.	Docket Text
6/28/2013	1	Criminal Complaint
		* * *
7/17/2013	11	Criminal Minutes - Preliminary 7-17-13
7/17/2013	12	Exh 1 Lab Report
7/17/2013	13	Certified Record - DMV
7/17/2013	14	Information
		* * *
9/4/2013	23	Defendant's Motion to Suppress Evidence Warrantless Bodily Intrusion
		* * *
10/14/2013	30	ADA Haberman Submits State's Brief
10/14/2013	31	State's Brief on the Implied Consent Law and McNeely
		* * *
10/16/2013	33	Criminal Minutes - Motion Hearing 10-16-13
10/16/2013	34	Exh 1 Informing the Accused
10/16/2013	35	Exh 2 Alcoholic Influence Report
10/16/2013	36	Exh 3 Blood/Urine Analysis

	* * *	
12/17/2013	44	Criminal Minutes - Jury Trial 12-17-13
	* * *	
12/17/2013	48-2	Exh 2 Statement of Alvin Swenson
12/17/2013	48-3	Exh 3 Stipulation on Lab Results
	* * *	
12/17/2013	48-7	Exh 7 Informing the Accused Form
12/17/2013	48-8	Exh 8 Lab Report
	* * *	
12/17/2013	52	Verdict - Guilty OWI
12/17/2013	53	Verdict - Guilty Oper w/PAC
	* * *	
3/3/2014	65	Judgment of Conviction
	* * *	
2/10/2015	77	Notice of Appeal
	* * *	
9/24/2013	81	Transcript, Preliminary Hearing/Arraignment 7-17-13
	* * *	
10/1/2014	86	Transcript, Motion Hearing 10-16-13
	* * *	
10/1/2014	89	Transcript, Jury Trial 12-17-2013

SUPREME COURT OF WISCONSIN

2015AP304-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Gerald P. Mitchell,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS

OPINION FILED: July 3, 2018

SUBMITTED ON BRIEFS:

ORAL ARGUMENT: April 11, 2018

SOURCE OF APPEAL:

Sheboygan Circuit, Terence T. Bourke

JUSTICES:

Concurred: KELLY, J., concurs, joined by R.G. RADLEY, J. (opinion filed).

Dissented: A.W. BRADLEY, J., dissents, joined by ABRAHAMSON, J. (opinion filed).

ATTORNEYS:

For the defendant-appellant, there were briefs filed by *Linda J. Schaefer* and *Schaefer Law Firm, S.C.*, Sturgeon Bay. There was an oral argument by *Linda J. Schaefer*.

For the plaintiff-respondent, there was a

brief filed by *Ryan J. Walsh*, chief deputy solicitor general, with whom on the brief were *Brad D. Schimel*, attorney general, and *David H. Perlman*, assistant attorney general. There was an oral argument by *Ryan J. Walsh*, chief deputy solicitor general.

An amicus curiae brief was filed on behalf of Mothers Against Drunk Driving by *Kevin M. St. John* and *Bell Giftos St. John, LLC*, Madison, with whom on the brief was *Theane D. Evangelis*, *Lauren M. Blas*, and *Gibson, Dunn & Crutcher, LLP*, Los Angeles, California. There was an oral argument by *Lauren M. Blas*.

Appeal from a judgment of the Circuit Court.
Affirmed.

¶1 PATIENCE DRAKE ROGGENSACK, C.J. This appeal is before us on certification from the court of appeals.

¶2 Gerald Mitchell was convicted of operating while intoxicated and with a prohibited alcohol concentration, based on the test of blood drawn without a warrant while he was unconscious, pursuant to Wis. Stat. § 343.305(3)(b) (2013–14).[1] Mitchell contends that the blood draw was a search conducted in violation of his Fourth Amendment rights.

¶3 We conclude that Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further,

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[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated.

through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances herein presented reasonably permitted drawing Mitchell's blood. Accordingly, we affirm Mitchell's convictions.

I. BACKGROUND

¶4 On the afternoon of May 30, 2013, officers from the City of Sheboygan Police Department were dispatched in response to a report that the caller had seen Mitchell, who appeared intoxicated, get into a gray van and drive away. Between 30 and 45 minutes later, Officer Alex Jaeger made contact with Mitchell. He found Mitchell walking near a beach. Mitchell was wet, shirtless and covered in sand. Mitchell's speech was slurred and he had difficulty maintaining his balance.

¶5 Mitchell admitted to Jaeger that he had been drinking prior to driving and that he continued drinking at the beach. He also stated that he had parked his vehicle "because he felt he was too drunk to drive." Nearby, officers found the gray van Mitchell was reported to have been driving.

¶6 After observing Mitchell's physical condition, Jaeger believed that it would not be safe to conduct standard field sobriety tests. Instead, he administered a preliminary breath test, which indicated a blood alcohol concentration (BAC) of 0.24.[2] Jaeger then arrested Mitchell for operating

[2] Preliminary breath tests are not sufficient evidence to prove prohibited alcohol concentrations at trial. Wis. Stat. § 343.303.

while intoxicated.

¶7 Following his arrest, and during the drive to the police station, Mitchell's physical condition deteriorated and his demeanor became more "lethargic." Upon arrival at the police station, it became apparent that an evidentiary breath test would not be feasible. Instead, Jaeger opted to transport Mitchell to a nearby hospital for a blood draw.

¶8 During the approximately eight-minute drive to the hospital, Mitchell "appeared to be completely incapacitated, [and] would not wake up with any type of stimulation." Upon arriving at the hospital, Mitchell needed to be transported in a wheelchair where he sat "slumped over" and unable to maintain an upright seating position.

¶9 After Mitchell entered the hospital emergency room, Jaeger read Mitchell the Informing the Accused form, thereby reading Mitchell the statutory opportunity to withdraw his consent to a blood draw. However, Mitchell was "so incapacitated [that] he could not answer." Jaeger directed hospital staff to draw a sample of Mitchell's blood.[3] They did so. Mitchell did not awaken during the procedure.

¶10 The blood draw occurred approximately one hour following Mitchell's arrest. The analysis of his blood sample showed a BAC of 0.222.

¶11 Mitchell was subsequently charged with driving with a prohibited alcohol concentration (PAC), as well as operating a motor vehicle while intoxicated (OWI), as a 7th offense. Prior to trial,

[3] There was no warrant sought prior to drawing Mitchell's blood.

Mitchell moved to suppress the results of the blood test. He alleged that the warrantless blood draw violated his rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

¶12 In response to Mitchell's motion, the State contended that he had consented to the blood draw when he drove his van on Wisconsin highways according to a subsection of Wisconsin's implied-consent law, Wis. Stat. § 343.305(2). The State also contended that as an unconscious person, he is presumed not to have withdrawn his consent, pursuant to § 343.305(3)(b). The State expressly stated that it was not relying on exigent circumstances to justify the blood draw.

¶13 The circuit court [4] denied Mitchell's suppression motion in reliance on Wis. Stat. § 343.305(3)(b). The circuit court concluded that the officer had probable cause to believe that Mitchell was driving while intoxicated, and therefore, the blood draw was lawful. A jury convicted Mitchell of the OWI and PAC charges.

¶14 Mitchell appealed his conviction based on the sole contention that the warrantless blood draw violated his Fourth Amendment right to be free from "unreasonable searches and seizures."

¶15 The court of appeals, noting the opportunity to clarify the law in light of our recent decision in *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812, [5] certified the following

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[4] The Honorable Terence T. Bourke of Sheboygan County presided.

[5] The court of appeals, noting that two of its prior cases had

questions: (1) whether "implied-consent," the potential for which is described in Wis. Stat. §§ 343.305(2) & (3)(a), which arises through a driver's voluntary conduct in operating a vehicle on Wisconsin roadways after drinking to intoxication, is constitutionally sufficient consent, and (2) whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment.

II. DISCUSSION

A. Standard of Review

¶16 Whether a suppression motion was properly denied presents a question of constitutional fact. *Howes*, 373 Wis. 2d 468, ¶17 (citing *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120). We will not set aside a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Brereton*, 2013 WI 17, ¶17, 345 Wis. 2d 563, 826 N.W.2d 369. However, the application of those facts to Fourth Amendment principles presents a question of law that we review independently. *Id.*

B. Fourth Amendment General Principles

¶17 The Fourth Amendment to the United

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reached opposite conclusions, asked us to clarify whether implied consent is equivalent to constitutionally sufficient consent. *Compare State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867 (holding that implied consent is not constitutionally sufficient consent), *with State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745 (holding that implied consent is constitutionally sufficient). *See also Cook v. Cook*, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997) (concluding that the court of appeals does not have the power to overrule or modify one of its published opinions).

States Constitution, and its Wisconsin counterpart, Article I, Section 11 of the Wisconsin Constitution,[6] protect persons' rights to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; Wis. Const. art. I, § 11. "As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 573 U.S. __, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). As a result, the Fourth Amendment does not prohibit all searches undertaken by government actors, but "merely proscribes those which are unreasonable." *Howes*, 373 Wis. 2d 468, ¶21 (quoting *Tullberg*, 359 Wis. 2d 421, ¶29 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991))).

¶18 Drawing blood is a search of the person. *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160, 2173 (2016) (stating that "our cases establish that the taking of a blood sample or the administration of a breath test is a search"); *Howes*, 373 Wis. 2d 468, ¶20 (concluding that a blood draw is a search). Furthermore, a warrantless search is "presumptively unreasonable." *State v. Brar*, 2017 WI 73, ¶16, 376 Wis. 2d 685, 898 N.W.2d 499 (quoting *Tullberg*, 359 Wis. 2d 421, ¶30).

¶19 However, "there are certain 'specifically established and well-delineated' exceptions to the Fourth Amendment's warrant requirement." *Brar*, 376 Wis. 2d 685, ¶16 (quoting *State v. Williams*,

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[6] "Historically, we have interpreted Article I, Section 11 of the Wisconsin Constitution in accord with the Supreme Court's interpretation of the Fourth Amendment." *State v. Arias*, 2008 WI 84, ¶20, 311 Wis. 2d 358, 752 N.W.2d 748.

2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834). One such exception is a search conducted pursuant to consent. *Brar*, 376 Wis. 2d 685, ¶16. Warrantless consent searches are reasonable; and therefore, they are consistent with the Fourth Amendment. *Fernandez v. California*, 571 U.S. 292, 134 Ct. 1126, 1137 (2014); *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

C. Consent

¶20 In determining whether consent was given, we employ a two-step process. First, we examine whether relevant words, gestures or conduct supports a finding of consent. *State v. Artic*, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430. Second, we examine whether the consent was voluntarily given. *Id.*

1. Implied Consent

¶21 As we have explained, consent to search need not be given verbally. *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998) (citing *United States v. Griffin*, 530 F.2d 739, 741 (7th Cir. 1976); *United States v. Donlon*, 909 F.2d 650, 652 (1st Cir. 1990) *invalidated on other grounds by United States v. Omar*, 104 F.3d 519 (1st Cir. 1997)). Consent given through conduct "provides a sufficient basis on which to find that the defendant consented to the search." *Phillips*, 218 Wis. 2d at 197 (concluding that defendant's affirmative assistance in the search of his bedroom demonstrated his consent to the search). "Through conduct, an individual may impliedly consent to be searched." *Brar*, 376 Wis. 2d 685, ¶17.

¶22 In addition, the United States Supreme Court has recently explained that consent also may

be shown by the context in which consent arises. *Birchfield*, 136 S. Ct. at 2185. In *Birchfield*, the Court said that "[i]t is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context." *Id.* (internal citations omitted). The Court's connection between context and consent was made in the course of *Birchfield's* review of searches incident to arrest for OWI in states that have implied-consent laws. *Birchfield* cited two cases that demonstrated constitutionally sufficient consent because of the context in which consent was lawfully implied: *Florida v. Jardines*, 569 U.S. 1 (2013) and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

¶23 In *Jardines*, the Court, through Justice Scalia, recognized the sanctity of the home and that at the "very core" of the Fourth Amendment "stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,'" and that this right extended to the curtilage of the home, including the home's front porch. *Jardines*, 569 U.S. at 6–7 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

¶24 However, the Supreme Court also said that the sanctity of the curtilage of one's home is not absolute and certain permissions to enter may be implied. *Jardines*, 569 U.S. at 8. In *Jardines*, the Court recognized that by putting a knocker on his door, the homeowner had given implicit consent for visitors to approach and said that the implicit granting of such permission "does not require fine-grained legal knowledge." *Id.* Rather, law enforcement could approach a homeowner's front

door "precisely because that is 'no more than any private citizen might do.'" *Id.* (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). The Court recognized that a homeowner who places a knocker on his front door impliedly invites visitors to approach and enter upon the home's curtilage. *Jardines*, 569 U.S. at 8. Stated otherwise, in the context established by the homeowner, consent to enter the curtilage and approach the front door was given.

¶25 The other decision referenced in *Birchfield*, *Marshall v. Barlow's, Inc.*, noted that while generally the Fourth Amendment prohibits searches without a warrant, certain businesses and industries are subject to exception. *Marshall*, 436 U.S. at 313. Indeed, "pervasively regulated business[es]" and "'closely regulated' industries 'long subject to close supervision and inspection,'" are subject to warrant exceptions for certain searches. *Id.* (quoting *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73-75, 77 (1970) (wherein the Court held that the statutory right to enter and inspect a facility authorized to serve liquor required no warrant for thesearch)).

¶26 The Fourth Amendment exception upheld in *Colonnade* was grounded in "unique circumstances" in that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy, could exist for a proprietor over the stock of such an enterprise." *Marshall*, 436 U.S. at 313 (internal citation omitted). Referring to the liquor and firearms industries, the Court said that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full

arsenal of governmental regulation." *Id.* According to the Court, businesses in these industries are part of "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Id.* By choosing to participate in certain businesses, the Court concluded that those persons had "accept[ed] the burdens as well as the benefits of their trade," in a manner different from other businesses and thus "in effect consents to the restrictions placed upon him." *Id.* Once again, it was the context in which such businesses are operated that evidenced voluntary consent to be subjected to significant governmental regulation. Stated otherwise, the context in which one operates a business involved in alcohol or firearms had a well-known history of significant governmental regulation such that an owner of such a business would have no reasonable expectation of privacy from governmental oversight of his business. *Id.*

¶27 *Birchfield's* discussion of the relationship between context and consent instructs that context is part of the totality of circumstances that courts should review when consent to search is at issue. In regard to the context of highway regulation, we note that the statutes at issue here are the legislature's attempt to stop the injuries and deaths drunken drivers inflict year after year on others who use Wisconsin highways.[7] That drunken driving has resulted in and

[7] The same is true across the nation. For example, it has been reported that in 2016 drunken driving took one life every 50 minutes in the United States. See National Highway Traffic Safety Administration, Drunk Driving, https://www.nhtsa.gov/risky-driving/drunk-driving (last visited June 25, 2018).

necessarily increased state regulation of the privilege of driving on public roadways is well known. Therefore, the context of well- publicized regulations forms part of the totality of circumstances we examine to determine whether a driver who has been arrested for OWI consented to be searched.

¶28 Some of the regulations to which drivers consent have never been challenged. For example, they agree to drive on the right side of the road, Wis. Stat. § 346.05; to yield the right- of-way to emergency vehicles, Wis. Stat. § 346.19; to comply with posted speed limits, Wis. Stat. § 346.57(4); and not to drive with a prohibited blood alcohol concentration, Wis. Stat. § 346.63(1)(b). While these regulations do not have implications for constitutional rights, drivers do not sign a form acknowledging these obligations each time they get into their vehicle; yet, they are held accountable and required to abide by each of them because they chose to drive a vehicle upon public highways.

¶29 Just as Wisconsin drivers consent to the above-listed obligations by their conduct of driving on Wisconsin's roads, in the context of significant, well-publicized laws designed to curb drunken driving, they also consent to an evidentiary drawing of blood upon a showing of probable cause to believe that they operated vehicles while intoxicated.[8] This qualified consent to search is required in order to exercise the privilege of driving in Wisconsin.[9] As *Birchfield* explained,

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[8] Of course, probable cause to believe that a driver is operating while intoxicated is sufficient to arrest thedriver.

[9] Probable cause to believe that a driver operated a vehicle while

implied consent laws condition "the privilege of driving on state roads and [] the privilege would be rescinded if a suspected drunk driver refused to honor that condition." *Birchfield*, 136 S. Ct. at 2169. Consent is complete at the moment the driver begins to operate a vehicle upon Wisconsin roadways if the driver evidences probable cause to believe that he or she is operating a vehicle while intoxicated. Wis. Stat. §§ 343.305(2) & (3)(a).[10]

¶30 As acknowledged by the United States Supreme Court, driving on state highways is a

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intoxicated is required before the driver must provide samples of breath, blood or urine. Wis. Stat. §§ 343.305(2) & (3)(a).

[10] The point in time when a driver consents has been described in various ways based on the facts of the case and the arguments of counsel. For example, in *Wintlend*, 258 Wis. 2d 875, the court of appeals addressed Wintlend's argument that the officer's reading the Informing the Accused form to him coerced consent. *Id.*, ¶8. The court rejected his argument and concluded that the statutory terms chosen by the legislature demonstrated that consent had been given before Wintlend was read the Informing the Accused form. *Id.*, ¶16.

In *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980), Neitzel's license was suspended for 60 days for his unreasonable refusal to permit chemical testing. *Id.* at 192. Neitzel argued that the refusal was not unreasonable because he had asked to consult his attorney before deciding and his request was denied. *Id.* at 193. In dismissing Neitzel's argument, we said that under the circumstances no right to counsel was provided. *Id.* We also explained that a driver must be arrested before he or she could be asked to submit to chemical testing, but custody at that point did not implicate a right to counsel. *Id.* at 200. Because the focus in Neitzel was on an alleged right to counsel, our discussion addressed that concern. However, our discussion herein explains why constitutionally sufficient consent occurs when a driver operates a vehicle on Wisconsin's highways and drinks or uses drugs to a point where the driver exhibits probable cause that he or she is intoxicated.

privilege; it is not a right. *Id.* In Wisconsin, it is a statutory privilege that comes with statutory obligations when that privilege is exercised. *Steeno v. State*, 85 Wis. 2d 663, 671, 271 N.W.2d 396 (1978) ("The granting of an automobile license to operate a motor vehicle is a privilege and not an inherent right.").

¶31 The United States Supreme Court recognized that implied consent laws are the context in which constitutionally sufficient consent for chemical testing may be given when it opined, "our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . [N]othing we say here should be read to cast doubt on them." *Birchfield*, 136 S. Ct. at 2185.

¶32 *Birchfield* also established a "categorical" rule that a breath test does not implicate "significant privacy concerns," and therefore, a warrant is not needed to administer a breath test. *Birchfield*, 136 S. Ct. at 2176-84. This is an interesting conclusion because of the Court's previous statements that there are no bright-line rules for determining when a warrant is not required. *See Missouri v. McNeely*, 569 U.S. 141, 158 (2013). It is also interesting because a driver's bodily alcohol concentration can be determined from evidentiary breath tests as well as from blood tests.

¶33 *Birchfield* went on to explain, "It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit

to such a test. There must be a limit to the *consequences* to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Birchfield*, 136 S. Ct. at 2185 (emphasis added). The limit on the *consequences* of the decision to drive while intoxicated was the imposition of criminal penalties for refusing to permit a blood draw. *Id.*

¶34 Criminal penalties for withdrawing consent to a blood draw were beyond the scope of implied-consent laws because there was an insufficient nexus between the consequence of criminal penalties and choosing to drive on the highways in those states that imposed criminal penalties for withdrawing consent to provide a blood sample for testing. *Id.* at 2186. In Wisconsin, the consequences of refusing to permit a blood draw are civil and evidentiary, not criminal. Wis. Stat. § 343.305(4).

¶35 Relevant to assessing future challenges to refusal to submit to a blood draw, the Supreme Court adopted the following standard: motorists are "deemed to have consented to only those conditions that are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to severity of the violation." *Id.* When applying that standard, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense [for refusing to submit]." *Id.* However, imposing "civil penalties and evidentiary consequences" on motorists who refuse to submit to a blood draw are permissible because civil penalties, such as license revocation, have a nexus to driving. *Id.* at 2185 (citing *McNeely*, 569 U.S. at

160-61).

¶36 Wisconsin imposes no criminal penalties for withdrawing consent previously given. The only criminal consequence imposed for drunken driving in Wisconsin arises from repeated OWI and PAC convictions and from convictions for causing injury or death by intoxicated use of a vehicle. *See generally* Wis. Stat. § 346.65. Criminal penalties do not arise from withdrawing consent to blood draws. Wis. Stat. § 343.305(4). All penalties for refusal are administrative and evidentiary. For example, a refusal that leads to a first OWI conviction subjects a defendant to a license suspension and a forfeiture but no jail time. Wis. Stat. §§ 343.305(4) & 346.65(1)(a).

¶37 Accordingly, we confirm that because it is constitutionally permissible to impose civil penalties as a consequence for refusing to submit to a blood draw, as Wis. Stat. § 343.305(4) provides, Wisconsin's implied-consent statutes, §§ 343.305(2) & (3)(a), describe a context consistent with *Birchfield* where constitutionally sufficient consent to search arises through conduct. *Birchfield*, 136 S. Ct. at 2185. Stated otherwise, it is not statutes that grant consent to search, but rather, consent is granted by the driver's exercising the privilege of driving on Wisconsin highways when he or she has imbibed sufficient alcohol or drugs to become intoxicated. Furthermore, if the consent that arises when a driver's conduct falls within §§ 343.305(2) & (3)(a) were not constitutionally sufficient consent for a blood draw, there would be no reason to provide a statutory opportunity to withdraw consent under § 343.305(4).

¶38 Furthermore, we presume that drivers know the laws applicable to the roadways on which they drive. *State v. Weber*, 2016 WI 96, ¶78, 372 Wis. 2d 202, 887 N.W.2d 554 (Kelly, J., concurring). Likewise, we also recognize, as has the United States Supreme Court, that in a state with civil penalties for refusal to submit to a blood draw, "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *South Dakota v. Neville*, 459 U.S. 553, 560 n.10 (1983).

¶39 In *Neville*, the Supreme Court examined whether Neville's refusal to submit to a blood-alcohol test could be used as evidence of guilt for drunken driving at his trial. The circuit court of South Dakota had suppressed Neville's refusal to submit to a blood-alcohol test based on the circuit court's conclusion that evidence of refusal violated Neville's federal constitutional rights. *Id.* at 556. The Supreme Court reversed the suppression because Neville's "right to refuse the blood- alcohol test [] is simply a matter of grace bestowed by the South Dakota legislature," not a constitutional right. *Id.* at 565. As the Court further explained, because a driver had no constitutional right to refuse a blood-draw when there was probable cause to arrest for OWI, the driver's refusal could be used against him at trial as evidence of guilt. *Id.*; *see also Howes*, 373 Wis. 2d 468, ¶62 (Gableman, J., concurring) ("[A] driver has no statutory or constitutional right to refuse [blood alcohol testing] without consequences.").[11]

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[11] Justices Shirley Abrahamson, Ann Walsh Bradley, Rebecca Grassl Bradley and Daniel Kelly manufacture a constitutional right to refuse blood-draws to test for blood-alcohol content of

¶40 Of course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder. *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005). However, when consent is withdrawn, civil consequences may follow because the opportunity to withdraw voluntarily given consent is not of constitutional significance. *Neville*, 459 U.S. at 565; Wis. Stat. § 343.305(4).

¶41 The legitimacy of implied-consent laws has been supported repeatedly by the United States Supreme Court. In *McNeely*, the Court stated that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *McNeely*, 569 U.S. at 160 (quoting *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). The Court further recognized that "drunk driving continues to exact a terrible toll on our society," and that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *McNeely*, 569 U.S. at 160–61.

¶42 Other states are in accord with our conclusion that drivers give constitutionally sufficient consent through driving on state

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drivers who operate vehicles while intoxicated, notwithstanding the United States Supreme Court's clearly stated explanation in *South Dakota v. Neville*, 459 U.S. 553, 560 n.10, 565 (1983), that drunken drivers have no constitutional right to refuse blood-alcohol testing. *State v. Dalton*, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120 (manufacturing a constitutional right for drunken drivers to refuse blood-alcoholtesting).

highways and drinking to a point evidencing probable cause of intoxication. For example, the Supreme Court of Colorado held that warrants need not be obtained for unconscious drivers as the result of their previously-given consent under Colorado's "Expressed Consent Statute." *People v. Hyde*, 393 P.3d 962 (Colo. 2017). The Colorado court recognized that "Hyde's statutory consent satisfied the consent exception to the Fourth Amendment warrant requirement." *Id.*, ¶3. Similarly, the Supreme Court of Kentucky has said that drivers "consent[] to testing by operating a vehicle in Kentucky." *Helton v. Commonwealth*, 299 S.W.3d 555, 559 (Ky. 2009).

¶43 As judicial opinions of other states, as well as the United States Supreme Court's prior statements show, "[i]mplied consent is not a second-tier form of consent." *Brar*, 376 Wis. 2d 685, ¶23. Rather, when a driver chooses to operate a vehicle upon Wisconsin's roads, he or she does so charged with knowing the laws of this state. *See Byrne v. State*, 12 Wis. 577 (*519), 580 (*521) (1860).

¶44 Those laws include Wis. Stat. §§ 343.305(2) & (3)(a) that function together. Section 343.305(2) provides that anyone who "drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of [alcohol or other prohibited substances], when requested to do so by a law enforcement officer." Section 343.305(3)(a) applies when a driver is arrested based on probable cause to believe that he or she is intoxicated, wherein a driver's conduct completes

his or her obligation to give samples of breath, blood or urine.

¶45 In the case before us, Mitchell chose to avail himself of the privilege of driving upon Wisconsin's roads. Because he did so while intoxicated, by his conduct he consented to the effect of laws that are relevant to exercising that privilege. He did not need to read them off one-by-one, and then sign a piece of paper acknowledging his consent to be subject to those rules and penalties for failing to follow them. By driving in Wisconsin, Mitchell consented to have samples of his breath, blood or urine taken upon the request of a law enforcement officer who had probable cause to believe he was intoxicated, unless he withdrew such consent. Wis. Stat. §§ 343.305(2) and (3)(a).

2. Voluntary Consent

¶46 A determination that consent has been given is not the end of our inquiry, we also must determine whether the consent was given "freely and voluntarily." *Artic*, 327 Wis. 2d 392, ¶32. "However, the State need not demonstrate that consent was given knowingly or intelligently." *Brar*, 376 Wis. 2d 685, ¶26 (citing *Schneckloth*, 412 U.S. at 241 ("Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.")). The concept of "'voluntariness' reflects an accommodation of complex, somewhat conflicting values." *Artic*, 327 Wis. 2d 392, ¶32 (citing *Schneckloth*, 412 U.S. at 224–25).

¶47 "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." *Phillips*, 218 Wis. 2d at 197. In evaluating the voluntariness of consent, we evaluate "the totality of all the surrounding circumstances." *Artic*, 327 Wis. 2d 392, ¶32 (quoting *Schneckloth*, 412 U.S. at 226). No single criterion controls voluntariness. *Phillips*, 218 Wis. 2d at 197.

¶48 In making a determination of voluntariness, the State bears the burden to prove by clear and convincing evidence that consent was given voluntarily. *Id.* Our determination of the voluntariness of consent is a mixed question of fact and law. *Id.* In addition, voluntariness is a determination that we consider relative to Wis. Stat. §§ 343.305(2) & (3)(a) when a driver commences operation of his or her vehicle on Wisconsin roadways and under § 343.305(3)(b) when an unconscious driver has not availed himself of an opportunity to withdraw consent previously given.

¶49 Consent to search that arises in the context of Wisconsin's implied-consent laws is voluntary in one respect that is similar to the voluntariness of consent in *Colonnade* because Wisconsin has a long history of close governmental regulation of its highways in regard to drunken drivers. Stated otherwise, the privilege of driving on Wisconsin highways comes within the context of well-publicized requirements to provide samples of breath, blood or urine to law enforcement who have probable cause to believe that the driver is intoxicated.

¶50 We now further consider voluntary consent under four subsections of Wisconsin's implied-consent law at issue in the case before us: Wis. Stat. §§ 343.305(2), 343.305(3)(a), 343.305(4) and 343.305(3)(b).[12]

a. Wisconsin Stat. §§ 343.305(2) & (3)(a)

¶51 The voluntariness of consent by conduct that occurs when a driver commences operation of his vehicle on Wisconsin roadways is unequivocal and constitutionally sufficient when he or she evidences the indicia of intoxication such that there is probable cause to believe he or she is driving under the influence. Stated otherwise, voluntary consent arises through the effect of a driver's conduct in the context of Wisconsin law, Wis. Stat. §§ 343.305(2) and 343.305(3)(a).

¶52 Wisconsin Stat. § 343.305(2) clearly provides, "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances . . . ." A driver's consent is conditioned on probable cause to believe he or she is intoxicated or has caused serious injury or death. As Wis. Stat. § 343.305(3)(a) provides, "Upon arrest

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[12] We note that other circumstances are impacted by Wisconsin implied consent law that we do not discuss here. *See* Wis. Stat. § 343.305(3)(ar)2., causing death or great bodily harm when there is reason to believe the driver violated state or local traffic law. Here, we limit our discussion to those circumstances where there are no facts in addition to probable cause to believe the driver was intoxicated.

of a person for violation of s. 346.63(1) [driving while intoxicated], (2m) [underage drinking], or (5) [commercial driver] or . . . (2) [causing injury] . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine." Therefore, as an initial matter, one consents to search by driving on Wisconsin roadways when one has imbibed sufficient alcohol to support probable cause to arrest. The choice to drive on Wisconsin roadways and the choice to drink or ingest drugs to the point of probable cause to arrest for OWI are voluntary choices.

b. Wisconsin Stat. § 343.305(4)

¶53 Wisconsin Stat. § 343.305(4) provides a statutory opportunity to withdraw consent given under §§ 343.305(2) and (3)(a), when an officer has probable cause to arrest the driver. However, civil penalties may follow when consent is withdrawn. Section 343.305(4) provides in relevant part:

> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs . . . or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person . . . .
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. . . . If you refuse to take any test that this

> agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.[13]

It is helpful to keep subsection (4) in mind when discussing Wis. Stat. § 343.305(3)(b), which is central to thisappeal.

¶54 Wisconsin Stat. § 343.305(4) provides a statutory opportunity to withdraw consent, even though a driver has operated a vehicle on Wisconsin roads and has imbibed sufficient alcohol to be arrested for OWI. Of course, one may withdraw consent previously given with or without a statutory reminder. *See Sanders*, 424 F.3d at 774. Nevertheless, a driver may forfeit the driver's opportunity to withdraw consent by failing to timely engage it. *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Furthermore, a defendant may forfeit an opportunity he or she otherwise would have by his or her conduct. *State v. Anthony*, 2015 WI 20, ¶59, 361 Wis. 2d 116, 860

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[13] Justices Shirley Abrahamson, Ann Walsh Bradley, Rebecca Grassl Bradley and Daniel Kelly strike down, sub silentio, Wis. Stat. § 343.305(4)'s provision that the fact of refusal can be used against a drunken driver in court because they label refusal of chemical testing a constitutional right. *Dalton*, 383 Wis. 2d 147, ¶61. However, the United States Supreme Court has concluded that refusing to take a blood test is not of constitutional significance and can be used against the defendant at trial. *Neville*, 459 U.S. at 565. The majority opinion in *Dalton* and the separate writings in this case will create confusion in Wisconsin courts on the admissibility of refusal evidence because *Neville* has not been overruled and remains authoritative on whether refusal is or is not a constitutional right.

N.W.2d 10.

¶55 Here, Mitchell drank sufficient alcohol to render himself unconscious. He had a BAC of 0.222. It is no wonder that he passed out. [14] Through this conduct, he forfeited all opportunity to withdraw the consent to search that he had given.

c. Wisconsin Stat. § 343.305(3)(b)

¶56 Mitchell was unconscious when his blood was drawn. Wisconsin Stat. § 343.305(3)(b) addresses blood draws from unconscious persons who have not availed themselves of the statutory opportunity that is provided by § 343.305(4) or otherwise taken steps to withdraw consent. Some who are unconscious have imbibed sufficient alcohol or drugs to render themselves unconscious; others may be unconscious due to an injury sustained in an accident. Section 343.305(3)(b) provides in relevant part:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63(1) [driving while intoxicated], (2m) [underage drinking] or (5) [commercial driver] . . . [or caused

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[14] *See* National Institute on Alcohol Abuse and Alcoholism, Alcohol Overdose: The Dangers of Drinking Too Much, https://pubs.niaaa.nih.gov/publications/AlcoholOverdoseFactsheet/Overdosefact.htm (Oct. 2015).

injury] one or more samples specified in par. (a) or (am) may be administered to the person.

¶57 The Fourth Amendment question is whether drawing Mitchell's blood while he was unconscious was unreasonable and therefore in violation of Fourth Amendment's prohibitions against unreasonable searches. Mitchell claims the blood draw was unreasonable because he was unconscious when the Informing the Accused form was read to him. The State claims that the blood draw was reasonable because Jaeger had arrested Mitchell for driving while intoxicated.[15]

¶58 Mitchell's self-induced physical condition does not render Wis. Stat. § 343.305(3)(b)'s presumption unreasonable under the totality of circumstances applicable to our Fourth Amendment discussion. First, by exercising the privilege of driving on Wisconsin highways,

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[15] The State's contention could be read to assert that the blood draw was a search incident to arrest within the traditional exception to the Fourth Amendment's warrant requirement.

Mitchell's blood draw parallels the search incident to arrest doctrine, as probable cause to arrest Mitchell for driving while intoxicated is fully supported by the record. That a search incident to arrest is an exception to the warrant requirement is an important principle to keep in mind. This is so because all unconscious drivers are not subjected to a blood draw under Wisconsin implied consent laws. Only those drivers for whom "a law enforcement officer has probable cause to believe that the person has violated [laws regulating use of intoxicants]" can be searched. Wis. Stat. § 343.305(3)(b). This limitation also is consistent with the reasonableness requirement of the Fourth Amendment. For an unconscious driver, a blood draw is the only means by which to obtain evidence of the crime for which he or she has been charged.

Mitchell's conduct demonstrated consent to provide breath, blood or urine samples to be tested in accord with §§ 343.305(2) & (3)(a) if law enforcement had probable cause to believe that he had operated his vehicle while intoxicated. Second, Jaeger had probable cause to arrest Mitchell for driving while intoxicated. His speech was slurred; he smelled of alcohol; he had difficulty maintaining his balance; his preliminary breath test showed a BAC of 0.24, which indicates significant intoxication. Third, Mitchell chose to drink sufficient alcohol to produce unconsciousness. Fourth, by his conduct, Mitchell forfeited the statutory opportunity to assert that he had "withdrawn consent" he previously gave. *Ndina*, 315 Wis. 2d 653, ¶29; *Anthony*, 361 Wis. 2d 116, ¶59.

¶59 Therefore, under the totality of circumstances as applied to Mitchell, Wis. Stat. § 343.305(3)(b)'s presumption is reasonable. Accordingly, drawing Mitchell's blood was reasonable, and no Fourth Amendment violation occurred.

¶60 Because we conclude that consent given by drivers whose conduct falls within the parameters of Wis. Stat. § 343.305 is constitutionally sufficient consent to withstand Fourth Amendment scrutiny, and although consent must be voluntary, it need not be knowing, we overrule *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. We do so for two reasons. First, we clarify that *Padley* has no precedential effect because its holding is in direct conflict with an earlier, published court of appeals decision, *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d

875, 655 N.W.2d 745. *Cook v. Cook*, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997) (concluding that the court of appeals cannot overrule or modify one of its published opinions). Second, *Padley* is simply wrong as a matter of law. There, the court of appeals said that "implied consent" is different than "actual consent," and that actual consent is given only when a driver affirms his or her previously-given implied consent after being read the Informing the Accused form. *See Padley*, 354 Wis. 2d 545, ¶38. The court also incorporated the concept of "knowingly" into consent law. *Id.*, ¶62. Under the reasoning in *Padley*, driving on Wisconsin highways and drinking, using drugs or being involved in an accident causing death or serious bodily injury while violating a state or local traffic law does not provide constitutionally sufficient consent through conduct. We conclude otherwise.

¶61 The question that remains in regard to Mitchell is whether Wis. Stat. § 343.304(3)(b)'s presumption that consent has not been withdrawn is reasonable for a driver who has suffered an injury rendering him or her unconscious, but for whom there is probable cause to believe that he or she operated a vehicle in violation of laws regulating the use of intoxicants.

¶62 We begin by noting that all drivers, by their conduct, consent to provide samples of their breath, blood or urine when requested by law enforcement personnel who have probable cause to arrest for driving while intoxicated. Wis. Stat. §§ 343.305(2) & (3)(a). We also recognize that consent to search once given may be withdrawn. *See Sanders*, 424 F.3d at 774. Although no magic words

are required to withdraw consent, the intent to withdraw must be unequivocal. *Id.* Withdrawal of consent given under implied-consent laws also may be withdrawn. Wisconsin Stat. § 343.305(4) reminds drivers of the opportunity to "withdraw" consent previously given. *See also State v. Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014) (concluding that under Idaho implied-consent laws, a suspected drunken driver can withdraw his or her consent to test for the presence of alcohol). However, for many unconscious drivers, it may be that they have taken no steps to demonstrate unequivocal intent to withdraw consent previously given.

¶63 Furthermore, the opportunity to refuse a blood test when there is probable cause to believe the driver is intoxicated is not of constitutional significance, as is shown by Supreme Court jurisprudence concluding that withdrawal of consent may be used as evidence of guilt at trial. *State v. Crandall*, 133 Wis. 2d 251, 255, 394 N.W.2d 905 (1986) (citing *Neville*, 459 U.S. at 565 (concluding that it is not "fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial")).

¶64 In addition, Wis. Stat. § 343.305(3)(b)'s presumption affects only unconscious drivers for whom law enforcement has probable cause to believe that the driver has violated statutory proscriptions on use of intoxicants. Therefore, those drivers who are unconscious but for whom law enforcement does not have probable cause to believe they drove while intoxicated will not be subject to the presumption of § 343.305(3)(b).

¶65 For drivers for whom the presumption applies, Wis. Stat. § 343.305(3)(b) is consistent with United States Supreme Court precedent that a warrantless search at arrest does not violate the Fourth Amendment when there is consent given prior to the search. *United States v. Robinson*, 414 U.S. 218, 224 (1373); *Schneckloth*, 412 U.S. at 222. Therefore, we conclude that under the totality of circumstances the presumption of § 343.305(3)(b) is reasonable. Accordingly, it does not violate Fourth Amendment rights of one for whom law enforcement has probable cause to believe he or she operated a vehicle after consuming alcohol or drugs to the point of intoxication.

III. CONCLUSION

¶66 We conclude that Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances reasonably permitted drawing Mitchell's blood. Accordingly, we affirm Mitchell's convictions.

By the Court.—The judgment of the circuit court is affirmed.

¶67 DANIEL KELLY, J. *(concurring).* I do not believe the state can waive the people's constitutional protections against the state. I nonetheless concur because performing a blood draw on an unconscious individual who has been arrested for operating a motor vehicle while intoxicated in violation of Wis. Stat. § 346.63 ("OWI") is reasonable within the meaning of the Fourth Amendment to the United States Constitution.[1]

¶68 This is not the first time we have considered whether a law enforcement officer may perform a blood draw on an individual pursuant to "consent" granted by Wis. Stat. § 343.305. Last term we considered whether such "implied consent" can satisfy the requirements of the Fourth Amendment to the United States Constitution. *See State v. Brar*, 2017 WI 73, ¶¶15, 28-29, 376 Wis. 2d 685, 898 N.W.2d 99 (lead opinion). No opinion attracted a majority of the court. I concurred because Mr. Brar was conscious and had provided express consent to a blood draw, a point on which a majority of the court agreed. However, because the court nonetheless addressed the constitutionality of the implied consent statute, I also explained why I believe that "implied consent" is actually consent granted by the legislature, not the suspect, and why legislative consent cannot satisfy the mandates of our State and Federal Constitutions. *See id.*, ¶¶44, 59 (Kelly, J., concurring); *see also id.*, ¶15 & n.6 (lead opinion) (discussing federal and state constitutional provisions). I incorporate that analysis here *in toto.*

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[1] I join paragraphs 1-2 and 4-28 of the lead opinion.

¶69 The court today is even more ambitious than it was in *Brar*. Legislatively-granted consent to perform a blood draw is justified, the court says, for the same reasons certain searches of pervasively-regulated businesses do not require warrants. Lead op., ¶¶25-28 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)). But the court misunderstands the significance of that line of cases. The searches considered there were not reasonable because a legislature said they were; they were reasonable because they did not intrude on the affected person's reasonable expectation of privacy. In *Colonnade Catering*, for example, the United States Supreme Court surveyed the regulatory history of the liquor industry, reaching as far back as England of the eighteenth century. *Colonnade Catering*, 397 U.S. at 75. The whole point of rehearsing that history was to demonstrate that a liquor retailer had no reasonable expectation his premises would be free from regular governmental inspection. *See id.* Therefore, the congressionally-developed inspection regime at issue in *Colonnade Catering* was constitutional because it operated in an area in which the retailer had no reasonable expectation of privacy. The United States Supreme Court has treated the firearm industry in a similar fashion. In *United States v. Biswell*, 406 U.S. 311 (1972), the Court said "[i]t is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment." *Id.* at 316. Although the Court chose a stilted means of explaining itself, it is apparent the Court had concluded that the

inspection regime in that case did not reach into an area in which the pawn dealer had a reasonable expectation of privacy. *See id.* The "pervasive-regulation" doctrine, therefore, allows warrantless inspection regimes only when the nature of the business at issue is such that the proprietor does not have an expectation of privacy.

¶70 The court should not venture into the "pervasive- regulation" arm of Fourth Amendment jurisprudence without a great deal of fear and trepidation. The rationale justifying this doctrine is too easy to abuse. If increased regulation decreases the areas in which individuals have a reasonable expectation of privacy, then the Fourth Amendment's protections are effectively contingent on the reach of the regulatory state. Through combined legislative and executive activity, oceans of regulations can wear away zones of privacy, allowing warrantless inspection regimes to follow in their wake.

¶71 Today's decision is a good example of the doctrine's erosive power. Driving, the court observes, is subject to many regulations, what with all the rules about staying on the right side of the road, speed limits, interactions with emergency vehicles, et cetera. The court could have mined that vein even more deeply than it did——under any definition, driving truly is pervasively-regulated. The temptation to reach for the doctrine under these circumstances is nearly irresistible. And why wouldn't it be? It fairly demands to be heard here. But this is a powerful and unruly force, and when the United States Supreme Court set it in motion, it impressed on the doctrine no internal logic capable of limiting its reach.

¶72 The court thinks to wield this doctrine here with limited effect——after all, we are simply justifying a warrantless blood draw. But the court misapprehends how the doctrine functions and, therefore, its consequences. If we are of a mind that this doctrine justifies the implied consent law, we may do so only if we first conclude that regulatory pervasiveness has removed the subject of its operation from the reasonable expectation of privacy. *See Colonnade Catering*, 397 U.S. at 75; *Biswell*, 406 U.S. at 316. That is to say, because driving is pervasively regulated, those who travel on Wisconsin's highways have no reasonable expectation of privacy as they engage in that activity. And if that is true, it would sweep away a large body of Fourth Amendment jurisprudence as it relates to traffic stops, searches of automobiles, searches of drivers and passengers, et cetera. Wielding this doctrine as the court does today, if we are serious about its application, calves off a substantial piece of the Fourth Amendment.

¶73 For these reasons, and the reasons I discussed in my *Brar* concurrence, I conclude that the consent implied by Wis. Stat. § 343.305 cannot justify the blood draw performed on Mr. Mitchell.

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¶74 But this case is not *Brar*, and different reasons justify the blood draw here. The most important distinction between the two cases is this: Mr. Mitchell was not conscious when the law enforcement officer determined that a blood draw was necessary. No Supreme Court decision has yet opined directly on whether a warrant is necessary to perform a blood draw under these circumstances;

I believe the interplay among *Schmerber v. California*, 384 U.S. 757 (1966), *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), leave that question open. Their combined rationale, however, indicates that no warrant is necessary to perform a blood draw when an individual has been arrested for OWI, the suspect is unconscious, and there is a risk of losing critical evidence through the human body's natural metabolization of alcohol.

¶75 For more than half a century now the United States Supreme Court has recognized that warrantless blood draws can be constitutional. In *Schmerber*, the Supreme Court recognized that exigent circumstances can justify a warrantless blood draw from an individual arrested on OWI charges. *See Schmerber*, 384 U.S. at 770-71. It said the human body's natural metabolization of alcohol could, under the right circumstances, cause an officer to "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.* at 770 (citation omitted).

¶76 More recently, the State of Missouri pressed the Supreme Court to adopt a rule that the natural metabolization of alcohol in the bloodstream presents a per se exigency. *McNeely*, 569 U.S. at 151-52. The Court refused, but confirmed the continuing vitality of the rule that the proper circumstances will still justify a warrantless blood draw. "We do not doubt," the Court said, "that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will

support an exigency justifying a properly conducted warrantless blood test." *Id.* at 153. Therefore, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at 156.

¶77 The constitutionality of a warrantless blood draw returned to the Supreme Court in the context of the "search incident to arrest" doctrine in *Birchfield*, 136 S. Ct. at 2179, 2185. There, the Court said this doctrine justifies a warrantless breath test when the individual has been arrested for OWI; however, it does not justify a warrantless blood draw (at least when the suspect is conscious). *See id.* at 2185. In reaching this conclusion, the Court placed heavy emphasis on the differing levels of intrusiveness between the two tests. *Id.* at 2178. Thus, for example, it said that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185.

¶78 Availability of the breath test, however, was the driving motivation for its ruling. In the absence of such an option, the reasonableness of a warrantless blood test increases:

> We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.

> Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Id. at 2184.

¶79 Combining the reasoning of *Schmerber*, *McNeely*, and *Birchfield* provides the necessary guidance for Mr. Mitchell's case. *Schmerber* established the ground-rule principle that a warrantless blood draw can be constitutional. *See Schmerber*, 384 U.S. at 770-71. *McNeely* refined the *Schmerber* holding when it explained that, under the right circumstances, "the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *See McNeely*, 569 U.S. at 153. *Birchfield* added two important pieces to the analysis. First, it established that an individual arrested for OWI may be searched incident to his arrest for evidence of intoxication without a warrant. *See Birchfield*, 136 S. Ct. at 2184. And second, it determined that the method by which law enforcement conducts the search (by breath test as opposed to blood test) depends on the availability of the less-intrusive option. *See id.* at 2185.

¶80 Here is how the Supreme Court's instructions apply in this case. Mr. Mitchell, of course, was arrested for OWI, so *Schmerber* and *McNeely* recognize that critical evidence of his intoxication was continually metabolizing away. They also explain that although metabolization alone would not support a warrantless blood draw, when combined with other elements it may. *Birchfield* says his privacy interest in the evidence

of intoxication within his body is no longer a factor because the "search incident to arrest" doctrine is a recognized exception to the warrant requirement. So the only question remaining is whether the search should be conducted via a breath test or a blood test. *Birchfield* tells us that we must consider the availability of the less intrusive test in making this decision. Mr. Mitchell, however, was unconscious, so the breath test was not an option. A warrantless blood test was reasonable, therefore, because he had been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence.

¶81 I recognize that *Birchfield* holds a cautionary note about blood tests performed on unconscious suspects, but it appears to be in the form of an explanation for why the Court devoted just two sentences to the subject:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Birchfield, 136 S. Ct. at 2184-85. Nothing in the opinion indicates the Supreme Court considered how its analytical structure would apply in the context of an unconscious suspect arrested for OWI, and it would be too much like reading tea leaves to give any substantive weight to a statement that simply gives the Court's reasons for not addressing the question we are deciding.[2]

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[2] The dissent believes *Birchfield* has already answered this question, and therefore concludes my "analytical exercise ultimately fails because it cannot be reconciled with *Birchfield's* central holding: 'a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.'" Dissent, ¶101 n.6 (quoting *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016)) (emphasis omitted). The Supreme Court stated that central holding, however, in the context of a suspect who, unlike Mr. Mitchell, was conscious. This is a distinction that *Birchfield* itself advanced, so it's entirely justifiable to explore its significance, as I have done in this opinion.

But there is an even more important reason the dissent should be chary of finding such a categorical prohibition in that precedent: *Birchfield* is not comfortable in its own skin. Its central logic is actually self-contradictory, which explains why both the court and the dissent are able to call on it for support. If the Supreme Court had endorsed implied-consent laws as sufficient to authorize a breath or blood test (as our court says), then it would have held that implied consent justified the breath test. But it didn't. It said the "search incident to arrest" exception to the Fourth Amendment's warrant requirement justified the breath test. On the other hand, if *Birchfield* forbids blood draws pursuant to an implied-consent law, as the dissent claims, then such a law could not justify the breath test either, inasmuch as the law either provides constitutionally-sound consent for both, or forneither.

So I disagree with the dissent that I cannot reconcile my analytical exercise to *Birchfield's* central holding. When the Supreme Court speaks with two contradictory voices in one opinion, the best we can do is follow its logic until it starts

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¶82 Apropos of nothing relevant to this case, the lead opinion says a quartet of the court's members, including the author of this concurrence and the justice who joins it, "label refusal of chemical testing a constitutional right [in *State v. Dalton*, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120]." *See* lead op., ¶53 n.13. If the lead opinion means to say that we understand the people of Wisconsin have a constitutionally-protected right to be free from warrantless, unreasonable searches, then it is spot-on. And if the lead opinion further means to say that we recognize that the people of Wisconsin may operationalize that constitutionally-protected right by refusing warrantless, unreasonable searches, then it again hits the bulls-eye. But none of that happened in *Dalton*. It happened when the people of this nation ratified the Bill of Rights. We have done nothing new here; we only recognize what is already the law.

¶83 Ultimately, the lead opinion is of two minds on whether a suspect may refuse a blood test, and it expressed both of them. On the one hand, it says that, "in a state with civil penalties for refusal to submit to a blood draw, 'a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test.'" Lead op., ¶38 (quoting *South Dakota v. Neville*, 459 U.S.

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contending with itself. Here, that means *Birchfield* stands for the proposition that, with respect to conscious drunk-driving suspects, the "search incident to arrest" doctrine covers breath tests, but not blood draws. Because Mr. Mitchell was not conscious, *Birchfield* does not control the disposition of this case.

553, 560 n.10 (1983)). But almost immediately afterwards it also said: "Of course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder." Lead op., ¶40 (citing *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005)). So which is it? May a suspect refuse a blood test or not?

¶84 Perhaps, however, the lead opinion means to say that when a blood test is conducted pursuant to consent——real consent, the kind that people provide, not legislatures——the consent can be withdrawn, but when conducted pursuant to legislatively-provided consent, it cannot. That seems to be the import of the observation that the "right to refuse the blood- alcohol test . . . is simply a matter of grace bestowed by the . . . legislature." *See* lead op., ¶39 (quoting *Neville*, 459 U.S. at 565). But if that is so, what possible jurisprudential theory allows a statute to make permanent what the constitution makes revocable?[3]

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¶85 For these reasons, I respectfully concur in our court's mandate.

¶86 I am authorized to state that Justice REBECCA GRASSL BRADLEY joins this

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[3] The right to refuse a search, and to revoke consent once given, has been a part of Fourth Amendment jurisprudence for a very long time. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (stating that consent may be refused); *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (stating that consent may be withdrawn); *United States v. Black*, 675 F.2d 129, 138 (7th Cir. 1982) (same); *Mason v. Pulliam*, 557 F.2d 426, 428 (5th Cir. 1977) (stating that nothing in *Schneckloth* prevents consent from being withdrawn).

concurrence.

¶87 ANN WALSH BRADLEY, J. *(dissenting).* A blood draw is a particularly intrusive search. It invades the interior of the human body and implicates interests in human dignity and privacy. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966). To allow a blood draw without a warrant runs counter to these significant interests, not to mention United States Supreme Court precedent.

¶88 The police took Gerald Mitchell's blood without a warrant while he was unconscious. According to the lead opinion[1], this is perfectly fine

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[1] I use the term "lead" opinion for two reasons. First, I am concerned that without this cue, the reader may mistakenly believe that the lead opinion has any precedential value. Although five justices join in the mandate of the opinion to affirm the court of appeals (Roggensack, C.J., joined by Ziegler, J., Gableman, J., Rebecca Grassl Bradley, J., and Kelly, J.,), it represents the reasoning of only three justices (Roggensack, C.J., joined by Ziegler, J., and Gableman, J.). Justices Rebecca Grassl Bradley and Kelly joined in the mandate, but they would rely on contrary reasoning. Other paragraphs of the lead opinion that Justice Kelly indicates that he joins provide only uncontested factual and legal background that do not include the lead opinion's reasoning. *See* Justice Kelly's concurrence, ¶67 n.1.

Although set forth in two separate opinions, four justices disagree with the reasoning of the lead opinion. Importantly, contrary to the lead opinion, four justices determine that the implied consent laws cannot justify the warrantless blood draw performed in this case (Abrahamson, J., Ann Walsh Bradley, J., Rebecca Grassl Bradley, J., and Kelly, J.).

The lead opinion fails to alert readers as to the non- precedential status of its essential reasoning. Lest the rule of law be unclear to courts and litigants: BY THEMSELVES, THE IMPLIED CONSENT LAWS CANNOT JUSTIFY A WARRANTLESS BLOODDRAW.

because Mitchell by implication "voluntarily consented" to a blood draw and, while he was unconscious, did not revoke such consent.

¶89 Contrary to the lead opinion, I determine that "implied consent" is not the same as "actual consent" for purposes of a Fourth Amendment search. By relying on the implied consent laws, the lead opinion attempts to create a statutory per se exception to the constitutionally mandated warrant requirement. Thus, it embraces a categorical exception over the constitutionally required consideration of the totality of the circumstances. Consent provided solely by way of an implied consent statute is constitutionally untenable.[2]

¶90 Accordingly, I respectfully dissent.

I

¶91 Mitchell was arrested for operating while intoxicated. En route to a nearby hospital, he lost consciousness. Despite Mitchell's incapacitation, a police officer read him the Informing the Accused form. Mitchell provided no response because he was unconscious. The officer then directed hospital staff to draw a sample of Mitchell's blood, and they did so. Mitchell remained unconscious as his skin was pierced and his blood taken.

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[2] I observe that the concurrence and this dissent are in accord on this point. The concurrence "do[es] not believe that the state can waive the people's constitutional protections against the state." Concurrence, ¶67. Accordingly, it concludes that "the consent implied by § 343.305 cannot justify the blood draw performed on Mr. Mitchell." *Id.*, ¶73.

¶92 Seeking to exclude the evidence obtained as a result of the blood draw, Mitchell filed a motion to suppress. He premised his motion on the contention that the warrantless taking of his blood while he was unconscious violated his Fourth Amendment rights.

¶93 The lead opinion rejects Mitchell's argument, concluding that the consent exception to the Fourth Amendment's warrant requirement applies. Lead op., ¶3. According to the lead opinion, Mitchell "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." *Id.* Further, in the lead opinion's view, Mitchell "forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given . . . ." *Id.*

II

¶94 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Eason*, 2001 WI 98, ¶16, 245 Wis. 2d 206, 629 N.W.2d 625. A warrantless search is presumptively unreasonable unless an exception to the warrant requirement applies. *State v. Tullberg*, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

¶95 One such exception to the warrant requirement is a search conducted pursuant to consent. *State v. Artic*, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. The lead opinion correctly states that relevant words, gestures or conduct may support a finding of consent. Lead op., ¶20 (citing

Artic, 327 Wis. 2d 392, ¶30).[3] However, it errs by departing from Mitchell's "words, gestures or conduct" to determine that he *impliedly* consented for the state to draw his blood.

¶96 The lead opinion's conclusion is based on Wisconsin's implied consent laws, one subsection of which provides that any person operating a motor vehicle in Wisconsin "is deemed to have given consent to one or more tests of his or her breath, blood or urine" when requested to do so by a law enforcement officer in certain circumstances. Wis. Stat. § 343.305(2).

¶97 Another subsection specifically addresses the situation where a driver is unconscious. Wisconsin Stat. § 343.305(3)(b) provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection." It further states that a law enforcement officer may administer a breath, blood, or urine test if probable cause exists that the driver has committed any of a list of offenses. *Id.*

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[3] The lead also cites *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998), for the proposition that consent to search need not be given verbally. Lead op., ¶21. In *Phillips*, when asked by law enforcement whether they could search the defendant's bedroom, "the defendant did not respond verbally, but he opened the door to and walked into his bedroom, retrieved a small baggie of marijuana, handed the baggie to the agents, and pointed out a number of drug paraphernalia items." 218 Wis. 2d at 197. The court concluded that "[t]he defendant's conduct provides a sufficient basis on which to find that the defendant consented to the search of his bedroom." *Id.* The affirmative assistance provided by the defendant in response to a request to search in *Phillips* is a far cry from the complete lack of response from the defendant here.

¶98. In determining whether the warrantless taking of a blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment, I begin my analysis with *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160 (2016). In *Birchfield*, the United States Supreme Court determined that "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185.

¶99 *Birchfield* emphasized the invasive nature of a blood test, which is significant for Fourth Amendment purposes. *See id.* at 2184. In comparison to a breath test, a blood test is "significantly more intrusive[.]" *Id.* As an intrusion "beyond the body's surface," a blood test implicates paramount "interests in human dignity and privacy[.]" *Id.* at 2183 (citing *Schmerber*, 384 U.S. at 769-70). Indeed, a blood test can provide a lot more information than just a person's blood alcohol content.[4]

¶100 The *Birchfield* court further addressed the precise circumstances that have arisen in this case:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as

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[4] "[A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160, 2178 (2016).

> a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and *when they arise, the police may apply for a warrant if need be.*

136 S. Ct. at 2184-85 (emphasis added).

¶101 This language compels a single conclusion: law enforcement needed a warrant here. First, the State concedes that there were no exigent circumstances that would justify a departure from the warrant requirement.[5] Second, the ultimate holding in *Birchfield* was that a blood test cannot be administered as a search incident to arrest for drunk driving. *Id.* at 2185. The lead opinion's interpretation of the implied consent statutes attempts to accomplish exactly what the *Birchfield* court said violates the Fourth Amendment——a blood test as a search incident to the arrest of an unconscious person for drunk driving.[6]

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[5] *See State v. Tullberg*, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

[6] The concurrence focuses on language in *Birchfield* stating a blood test's "reasonableness must be judged in light of the availability of the less intrusive alternative of a breath test." *Birchfield*, 136 S. Ct. at 2184; *see* concurrence, ¶¶77-79. It creatively interprets this language to indicate that, because a breath test was unavailable due to Mitchell's unconsciousness, a blood test was constitutionally reasonable. *Id.*, ¶80. The concurrence's analytical exercise ultimately fails because it cannot be reconciled with *Birchfield*'s central holding: "a breath test, *but not a blood test*, may be administered as a search

¶102 Unlike the lead opinion, I would follow, rather than attempt to overrule, the court of appeals in *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. The *Padley* court emphasized that, when analyzing whether there was a consensual search, the determining factor was whether the driver gave *actual* consent to the blood draw:

> [T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.

354 Wis. 2d 545, ¶39. As Justice Abrahamson has

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incident to a lawful arrest for drunk driving." *Birchfield*, 136 S. Ct. at 2185 (emphasisadded).

Federal and state courts around the country have cited the "but not a blood test" language a multitude of times. *See, e.g., Robertson v. Pichon*, 849 F.3d 1173, 1184 n.7 (9th Cir. 2017; *Espinoza v. Shiomoto*, 215 Cal. Rptr. 3d 807, 829 (Ct. App. 2017); *State v. Ryce*, 396 P.3d 711, 717 (Kan. 2017); *State v. Reynolds*, 504 S.W.3d 283, 307 (Tenn. 2016). The concurrence is unable to cite to any court that eschews the clear language of *Birchfield's* central holding in favor of the unique interpretation it now embraces.

explained, "[t]he *Padley* court concluded that a driver's actual consent occurs after the driver has heard the Informing the Accused Form, weighed his or her options (including the refusal penalties), and decided whether to give or decline actual consent." *State v. Brar*, 2017 WI 73, ¶116, 376 Wis. 2d 685, 898 N.W.2d 499 (Abrahamson, J., dissenting).

¶103 That implied consent and actual consent are separate and distinct concepts is confirmed by an analysis of recent United States Supreme Court precedent in addition to *Birchfield*.[7] In *Missouri v. McNeely*, the Supreme Court determined that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." 569 U.S. 141, 156 (2013). A case by case determination is the antithesis of a categorical exception. Although *McNeely* was an exigent circumstances case, the court's emphasis on the totality of the circumstances suggests broad application of the case by case determinations it requires. *Brar*, 376 Wis. 2d 685, ¶122 (Abrahamson, J., dissenting).

¶104 Indeed, the Supreme Court implied such a broad application of *McNeely* in *Aviles v. Texas*, 571 U.S. 1119 (2014). In *Aviles*, the Court vacated a Texas judgment upholding a warrantless blood draw based not on actual consent but on implied consent derived through the Texas implied consent law. 571 U.S. 1119 (2014). The Court

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[7] For further in-depth analysis of this assertion, *see State v. Brar*, 2017 WI 73, ¶¶119-126, 376 Wis. 2d 685, 898 N.W.2d 499 (Abrahamson, J., dissenting).

further remanded the *Aviles* case to the Texas court of appeals for further consideration in light of *McNeely*. *Id.*

¶105 "*Aviles* suggests that *McNeely* should be read broadly to apply to all warrantless blood draws and that the Texas implied consent statute was not a per se exception to the Fourth Amendment justifying warrantless blood draws." *Brar*, 376 Wis. 2d 685, ¶123 (Abrahamson, J., dissenting). On remand the Texas court of appeals concluded that the Texas implied consent statute "flies in the face of *McNeely's* repeated mandate that courts must consider the *totality* of the circumstances of each case." *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. Ct. App. 2014).

¶106 The upshot of these United States Supreme Court cases is that reliance on an implied consent statute to provide actual consent to a Fourth Amendment search violates *McNeely's* requirement that each blood draw in a drunk driving case be analyzed on a case by case basis. The implied consent statute attempts to create a per se exception to the warrant requirement. Of course, categorical consent is by definition not individualized.

¶107 The lead opinion employs the simple act of driving an automobile as justification for a search. The untenability of the lead opinion's position is aptly illustrated by Justice Kelly's concurrence in *Brar*, 376 Wis. 2d 685, ¶¶59-66 (Kelly, J., concurring). As Justice Kelly explains, a court's normal constitutional inquiry into whether consent is given involves an examination of the totality of the circumstances and a determination

that the consent was voluntary and not mere acquiescence to authority. *Id.*, ¶¶59-62. On the other hand, "[f]or 'consent' implied by law, we ask whether the driver drove his car." *Id.*, ¶64.

¶108 Further, the lead opinion errs by relying not on a constitutionally well-recognized exception to the warrant requirement, but instead on a Wisconsin statute, to curtail constitutional protections. By seeking to create a *statutory*, per se consent exception to the warrant requirement, the lead opinion further steps into a minefield. *See* lead op., ¶¶53-55 (asserting that Mitchell "forfeited the statutory opportunity to withdraw the consent to search that he had given.").

¶109 A blood draw is plainly a "search" for Fourth Amendment purposes. *Birchfield*, 136 S. Ct. at 2185. Accordingly, one has a constitutional right, not merely a statutory right, to refuse such a search absent a warrant or an applicable exception.[8] *See State v. Dalton*, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120. Under the lead opinion's analysis, however, the opportunity to refuse an unconstitutional search is merely a matter of legislative grace. If the ability to withdraw consent is merely statutory, could the legislature remove the ability to withdraw consent

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[8] The lead opinion's reliance on *South Dakota v. Neville*, 459 U.S. 553, 560 n.10 (1983), is misplaced. *See* lead op., ¶¶38-39. *Neville* was decided pre-*McNeely* and pre-*Birchfield*. Both *McNeely* and *Birchfield* have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment *Neville* case on which the lead opinion relies.

entirely? For the Fourth Amendment to have any meaning, such a result cannot stand.

¶110 I therefore conclude that implied consent is insufficient for purposes of a Fourth Amendment search. As the court of appeals explained in *Padley*, the implied consent law does not authorize searches. Rather, it authorizes law enforcement to require a driver to make a choice: provide actual consent and potentially give the state evidence that the driver committed a crime, or withdraw implied consent and thereby suffer the civil consequences of withdrawing consent. *Padley*, 354 Wis. 2d 545, ¶39.

¶111 A person who is unconscious cannot make this choice. Because he was unconscious Mitchell did not react to the Informing the Accused Form when law enforcement presented him with his options. He exhibited no "words, gestures, or conduct" that would indicate his actual consent to a blood draw. *See Artic*, 327 Wis. 2d 392, ¶30.

¶112 Because consent provided solely by way of an implied consent statute is not constitutionally sufficient, I determine that the results of Mitchell's blood draw must be suppressed. Accordingly, I respectfully dissent.

¶113 I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

WISCONSIN COURT OF APPEALS

DISTRICT II

Appeal No. 2015AP304-CR

Cir. Ct. No. 2013CF365

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GERALD P. MITCHELL,

DEFENDANT-APPELLANT.

FILED

MAY 17, 2017

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

This cases raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.

BACKGROUND

Gerald P. Mitchell was charged with operating a motor vehicle while intoxicated (OWI), and operating with a prohibited alcohol concentration (PAC).[1] He moved to suppress the results of a blood test taken while he was unconscious. The parties do not contest the basic facts on appeal.

Officer Alexander Jaeger was the sole witness at the suppression hearing. He testified that around 3:17 p.m. on May 30, 2013, he received a dispatch call to check on the welfare of a male subject in Sheboygan County. When he arrived, he spoke with the complainant, Alvin Swenson, who informed Jaeger that he knew Mitchell and "received a telephone call from ... Mitchell's mother concerned about his safety." Swenson told Jaeger that he went to his window shortly after the call and observed Mitchell in a discombobulated state. Mitchell was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty maintaining balance, nearly falling several times before getting into a gray minivan and driving away."

Jaeger was able to locate Mitchell walking down St. Clair Avenue about one-half hour after speaking with Swenson. A gray van was also found nearby on Michigan Avenue. Mitchell's state was consistent with what Swenson described. Mitchell was not wearing a shirt, and was wet and covered in sand

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[1] Mitchell had six previous OWI convictions, which subjected him to enhanced penalties. *See* WIS. STAT. § 346.65(2)(am)6. (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"similar to if you had gone swimming in the lake." Jaeger explained that Mitchell "was slurring his words" and "had great difficulty in maintaining balance," nearly falling over "several times," necessitating Jaeger and another officer to help him "to ensure he wouldn't fall."

Initially, Mitchell stated that he had been drinking "in his apartment." However, he later altered his story and informed Jaeger "that he was drinking down at the beach" and parked his vehicle "because he felt he was too drunk to drive." Jaeger further explained that Mitchell's current condition made administration of the standard field sobriety tests unsafe, so he declined to administer them. Jaeger did administer a preliminary breath test, which indicated an alcohol concentration of .24. Based on his observations, Jaeger arrested Mitchell for OWI at approximately 4:26 p.m.

On the way to the police station, Mitchell's condition began to decline, and he became more lethargic. Upon arriving at the station, Mitchell had to be helped out of the squad car. Jaeger concluded that a breath test would not be appropriate, and he took Mitchell from the station to the hospital for a blood test. The drive took approximately eight minutes. During the drive, Mitchell "appeared to be completely incapacitated, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair." Jaeger then read the "Informing the Accused form verbatim" to the inert Mitchell. Mitchell did not respond. Because of Mitchell's "unusual" level of incapacitation, obtaining affirmative verbal "consent" at that time was not possible. Jaeger admitted on cross-examination that he could have applied for a

warrant; he did not. Accordingly, at 5:59 p.m. a blood sample was taken, which revealed a blood alcohol concentration of .222g/100mL.[2]

Mitchell argued that the blood test should be suppressed because it was taken without a warrant or his consent. The State responded that Mitchell had consented to the blood draw via the "implied consent" provided for in WIS. STAT. § 343.305. The State explained that under § 343.305(3)(b), unconscious persons are presumed not to have withdrawn their consent, and therefore—because Mitchell was unconscious—the warrantless blood draw was pursuant to this (implied) consent.

The State expressly disclaimed that it was relying on exigent circumstances to justify the draw, explaining that "[t]here is nothing to suggest that this is a blood draw on [an] exigent circumstances situation when there has been a concern for exigency." The circuit court denied Mitchell's motion, reasoning that WIS. STAT. § 343.305(3)(b) "makes clear that an unconscious operator ... cannot withdraw their consent to a blood sample." The only remaining question, the court reasoned, was whether probable cause supported the blood draw, which it clearly did.

After a jury trial, Mitchell was convicted on both the OWI count and the PAC count. He was sentenced to three years of initial confinement and three years of extended supervision on each count to be served concurrently. Mitchell appeals from his convictions.

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[2] Although the specific results were not mentioned during the suppression hearing, Mitchell entered into a stipulation at trial that the results were .222g/100mL.

DISCUSSION

This case squarely asks whether the "implied consent" outlined in WIS. STAT. § 343.305(3)(b) constitutes consent to a search under the Fourth Amendment. Although no case has explicitly decided the precise issue of whether a warrantless blood draw on an unconscious motorist may be justified solely by "implied consent," our precedents do address whether statutory implied consent is actual consent. These cases offer differing answers to that question, and accordingly, we must certify. *See Marks v. Houston Cas. Co.*, 2016 WI 53, ¶¶78- 79, 369 Wis. 2d 547, 881 N.W.2d 309 (holding that the court of appeals should certify an issue where two of its cases conflict).

We certified this precise issue previously in *State v. Howes*, No. 2014AP1870-CR, unpublished certification (WI App Jan. 28, 2016). Although certification was granted, the lead opinion decided the case on the basis that exigent circumstances justified the search. *State v. Howes*, 2017 WI 18, ¶3, 373 Wis. 2d 468, __ N.W.2d. __. Justice Gableman, joined by Justice Ziegler, authored a concurrence explaining his view that implied consent constitutes actual consent. *Id.*, ¶¶52, 84 (Gableman, J., concurring). Justice Abrahamson authored a dissent that explained her view that implied consent did not constitute actual consent for Fourth Amendment purposes. *Id.*, ¶¶89, 136 (Abrahamson, J., dissenting). She was joined in this reasoning by Justice Ann Walsh Bradley and Justice Kelly. *Id.*, ¶154. With no controlling majority view, this question remains unanswered.

This case presents the opportunity to clarify the law head-on. While consent is not the only circumstance in which a warrantless search is permissible, none of the other "few" and "well-delineated" exceptions were argued, briefed, or otherwise addressed. *See State v. Faust*, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371 ("Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment."). In particular, this case is not susceptible to resolution on the ground of exigent circumstances. No testimony was received that would support the conclusion that exigent circumstances justified the warrantless blood draw. Jaeger expressed agnosticism as to how long it would have taken to obtain a warrant, and he never once testified (or even implied) that there was no time to get a warrant. The State, which bears the burden to prove that exigent circumstances existed and justified the warrantless intrusion, conceded that this exception is inapplicable below, and it does the same before us. The sole question, then, is whether Mitchell consented to the blood draw.

A. Legal Overview

The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. Under these provisions, "[w]arrantless searches are per se unreasonable, subject to several clearly delineated exceptions." *State v. Artic*, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. Consent is one of these "clearly delineated exceptions." *Id.* Although consent may be given by "words, gestures, or conduct," it must be actual consent, which is a question of historical fact.

Id., ¶30. It is the State's burden to establish and prove by clear and convincing evidence that consent was voluntary. *Id.*, ¶32.

The United States Supreme Court has "referred approvingly of the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016). But it has yet to decide whether the "implied consent" that flows from a statutory scheme constitutes actual Fourth Amendment consent. *See id.* at 2185. Some state courts have concluded that statutory implied consent satisfies the Fourth Amendment. *See, e.g., Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 866-67 (Idaho Ct. App. 2015), *review denied* (Idaho Dec. 23, 2015). Others have reasoned that such implied consent is a legal fiction that does "not take into account the totality of the circumstances" as required by the United States Supreme Court, and therefore implied consent alone cannot justify a warrantless search. *See, e.g., Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014) (citation omitted).

Wisconsin's implied consent law is contained in WIS. STAT. § 343.305. It provides as follows:

> Any person who ... drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law

> enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Sec. 343.305(2). Because Mitchell was unconscious, it is the "implied consent" to submit to a blood test "when required to do so" under para. (3)(b) that concerns us here.

Addressing unconscious motorists, WIS. STAT. § 343.305(3)(b) operates in a simple, straightforward manner. It provides the following:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated [WIS. STAT. §] 346.63(1) ... one or more samples specified in par. (a) or (am) may be administered to the person.

Id. Thus, by choosing to drive on public roads prior to losing consciousness, an unconscious person is "deemed to have given consent" to his or her blood being tested. That consent is "presumed" not to have been withdrawn. Accordingly, an officer may act on this "implied consent" and conduct a warrantless blood draw provided that the officer "has probable cause to believe" the unconscious person has violated WIS. STAT. § 346.63(1)—as Jaeger concededly did

here.

B. The Parties' Positions

The parties agree that WIS. STAT. § 343.305(3)(b) is the applicable provision at issue. Neither party contests that Jaeger had probable cause to believe Mitchell was guilty of OWI at the time of the blood draw. The parties disagree, however, about whether the blood draw was reasonable under the Fourth Amendment.

The State relies exclusively on Mitchell's "implied consent" to justify the warrantless blood draw. The State's position is simple: Mitchell consented to have his blood drawn when he drove on Wisconsin highways and never withdrew that consent. In the State's view, this "consent" passes constitutional muster.

Mitchell takes the position that statutory implied consent cannot operate as Fourth Amendment consent because he had "no opportunity to consent or to refuse consent." In his view, consent occurs when an officer reads the Informing the Accused, not when a person drives on Wisconsin roads. Because he was incapable of giving affirmative consent to the blood draw, he concludes that the blood draw cannot be justified under the consent exception.[3] Thus, though

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[3] Mitchell additionally urges that WIS. STAT. § 343.305(3)(b) should not apply where police have time to obtain a warrant. Because "the warrant process would not have significantly increased the delay before the blood test could be conducted," he maintains Jaeger was required to obtain a warrant. He grounds his argument in "public policy" and the Supreme Court's exigent circumstances analysis in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). However, because the State has conceded that the blood draw was not justified by exigent circumstances, this argument need not be addressed. The real issue is whether Mitchell

he does not quite frame it as such, his argument is in effect that the implied consent applying to unconscious individuals as described in WIS. STAT. § 343.305(3)(b) is unconstitutional—i.e., it cannot justify a warrantless blood draw.

C. Our Precedents Offer Conflicting Answers

Our certification in *Howes* explained in much greater detail the case law and constitutional background to this question. Having just considered *Howes*, the members of the court are well aware of the important questions and various arguments pro and con. Rather than retread and repeat the same ground, we briefly explain why we believe we are compelled to certify this question again. Namely, two of our own cases—*State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, and *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745—specifically addressed how the implied consent statute operates and whether it satisfies the consent exception, and both came to incompatible answers.

In *Padley*, it was undisputed that the defendant actually consented to having her blood drawn. *Padley*, 354 Wis. 2d 545, ¶11. At issue, was whether Padley's consent was voluntary. *Id*, ¶12. We rejected her argument that her consent was coerced, concluding that the implied consent statute offered Padley a choice between consenting to the blood draw or withdrawing her "implied consent" and facing the statutory penalties. *Id.*, ¶27. Although

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consented to the blood draw. If he did, the practicality of obtaining a warrant is immaterial; the search would be justified under the consent exception.

this choice was difficult, we concluded that it passed constitutional muster. *Id.* In our discussion, we explained the meaning of "implied consent" in a manner that affects this case.

> On occasion in the past we have seen the term "implied consent" used inappropriately to refer to the consent a driver gives to a blood draw at the time a law enforcement officer requires that driver to decide whether to give consent. However, actual consent to a blood draw is not "implied consent," but rather a possible result of requiring the driver to choose whether to consent under the implied consent law.
>
> There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized....

Id., ¶¶25-26. In other words, implied consent (at least in that scenario) was not actual consent, but a choice between two alternatives: consent or face statutory penalties.

We also took the time to "address some confusion in the arguments of the parties regarding the implied consent law." *Id.*, ¶37. Of particular note, we explicitly rejected the State's argument that "implied consent ... is still consent." *Id.* The contention that "'implied consent' alone can 'serve as a valid exception to the warrant requirement'" was, we stated, "incorrect." *Id.* We explained, "It is incorrect to say that a driver who consents to a blood draw ... has given 'implied consent.'" *Id.*, ¶38. Rather, in that circumstance "consent is *actual* consent, not *implied* consent." *Id.* (emphasis added). We further reasoned that "the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether" to give consent. *Id*, ¶39. Said another way, implied consent is not really consent; it "does not authorize searches." *Id*, ¶40. Rather, it is a legal trigger that authorizes law enforcement to require a choice: actually consent or face sanctions. *Id*, ¶40. We acknowledged tension between this view of implied consent and the statute's clear statement that "implied consent is deemed the functional equivalent of actual consent" for unconscious drivers under certain circumstances. *Id.*, ¶39 n.10. However, we left resolution of that "tension" for another day. *Id.* Though the discussion in *Padley* was based on it's statutory application to conscious drivers, the case still sets forth two broad propositions of law: (1) consent is given (or "withdrawn") at the time the officer reads the Informing the Accused form, and (2)

"implied consent" does not by itself satisfy the consent exception.

Several years prior to *Padley*, we addressed the implied consent statute in *Wintlend*. In that case, we were faced with the same scenario as *Padley*: a motorist was stopped for OWI, was read the Informing the Accused warnings, and consented to a blood draw. *Wintlend*, 258 Wis. 2d 875, ¶2. As in *Padley*, Wintlend argued that although he consented to the blood draw, his consent was not voluntary.

Critical to whether Wintlend's consent was coerced was the question of the precise time "coercion rears its head." *Wintlend*, 258 Wis. 2d 875, ¶14. In other words, when did Wintlend consent for Fourth Amendment purposes? Wintlend maintained (like our later decision in *Padley*) that he consented at the time the officer read him the Informing the Accused warnings. *Id.* He further argued that his consent was coerced because he was forced to choose to either consent to a blood draw or face suspension of his license. *Id.* We rejected his arguments. Relying on *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980)—a case not addressing the consent exception or the Fourth Amendment— we reasoned that WIS. STAT. § 343.305 provides that "when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she co[illegible]nts to submit to the prescribed chemical tests." *Wintlend*, 258 Wis. 2d 875, ¶12.[4] Thus, for

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[4] Here too we conceded some tension. The conclusion that implied consent takes place when a person obtains his or her license does not sit comfortably with the plain language of WIS. STAT. § 343.305(2) that any person "who drives or operates a

Fourth Amendment purposes, "the time of consent is when a license is obtained," not when confronted with the Informing the Accused warnings. *Id.*, ¶¶12-14.

We further concluded that the implied consent given when a license is obtained is actual, Fourth Amendment consent, and that such consent is voluntary. *Id.*, ¶¶13-14. We explained:

> [I]t stands to reason that any would-be motorist applying for a motor vehicle license is not coerced, at that point in time, into making the decision to get a license conditioned on the promise that if arrested for drunk driving, the motorist agrees to take a test or lose the license.

Id., ¶13. Because there was no unconstitutional coercion, we concluded that Wintlend's implied consent—which he gave as a condition of receiving a license—satisfied the consent exception. *Id.*, ¶¶1, 19. Again, two critical points of reasoning emerge, both contrary to *Padley*'s reasoning. First, the consent that matters for Fourth Amendment purposes takes place when a motorist obtains his or her license, and second, this statutory "implied consent" is sufficient to satisfy the consent exception to the Fourth Amendment.

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motor vehicle upon the public highways ... is deemed to have given consent." *State v. Wintlend*, 2002 WI App 314, ¶15, 258 Wis. 2d 875, 655 N.W.2d 745. But we concluded that we were bound by our interpretation of *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980). *Wintlend*, 258 Wis. 2d 875, ¶14.

Like *Wintlend* and *Padley*, the issue here is whether the "implied consent" that is statutorily deemed to have occurred when a driver chooses to drive on a public road supplies voluntary consent to a blood draw for Fourth Amendment purposes under the conditions set forth in the law. Because Mitchell was unconscious at the time of the blood draw, the only possible way to conclude he consented is to hold that "implied consent" under WIS. STAT. § 343.305 is actual, Fourth Amendment consent. On this question, *Wintlend* and *Padley* offer, or at least strongly suggest, two different answers. *Wintlend* implies that the "implied consent" provided for in WIS. STAT. § 343.305 is actual, voluntary consent, at least so long as the suspect does not withdraw that consent. *Padley*, on the other hand, explicitly rejected that position when it was offered by the State. The cases also disagree about when consent is given—an issue critical to whether consent is in fact given and voluntary. Neither case directly addressed our precise factual issue, but we cannot resolve this case without ignoring or modifying the differing analyses in *Padley* and *Wintlend*.

Wintlend predates *Padley* and might arguably govern. *See Marks*, 369 Wis. 2d 547, ¶78. But as we are unable to resolve conflicts in precedent, the proper course of action in this situation is to certify the question. *Id.*, ¶79 (holding that the court of appeals may not "overrule, modify, or withdraw language from a previously published decision" and a court of appeals decision "that a case impermissibly modified an earlier case and is thus not binding is effectively the same as overruling that case"). We ask the Wisconsin Supreme Court to accept certification and provide clear guidance to the

bench, the bar, and the public.

State of Wisconsin
Circuit Court
Sheboygan County

State of Wisconsin,
Plaintiff,

v.

Gerald P. Mitchell,
Defendant.

Case No. 13 CF 365

Before the Honorable Terence T. Bourke
July 17, 2013

Transcript of Preliminary Hearing and Arraignment [EXCERPT]

* * *

[3] ATTORNEY HABERMAN: Thank you, Your Honor. State will call Alex Jaeger.

**** *OFFICER ALEX JAEGER,* ****

called as a witness, having been first duly sworn,

was examined and testified as follows:

COURT CLERK: State your name and spell your last name.

THE WITNESS: Officer Alex Jaeger, J-A-E-G-E-R.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Jaeger, how are you employed, sir?

[4] **A** City of Sheboygan police officer.

Q How long have you been a police officer for?

A With the City for just over four years.

Q And prior to that you were with the Sheboygan Sheriff's Department; is that correct?

A Yes, for about just under three years.

Q Total of about seven years in law enforcement?

A Yes.

Q Directing your attention to May 30, 2013, were you working at approximately 3:17 p.m.?

A Yes I was.

Q And in fact, were you dispatched to 1127 North Eighth Street in the city of Sheboygan, Sheboygan County, Wisconsin?

A Yes I was.

Q Do you know what kind of residence that is?

A It's a temporary living, transitional living facility.

Q Okay. And who did you make contact with there?

A I spoke to Alvin Swenson, who was reporting to me, or who was the complainant.

Q And what did Alvin report to you about why officers would have been called?

ATTORNEY WINGROVE: I'm going to object. This is going to call for hearsay as to Mr. Swenson's **[5]** opinion about something. And, of course, the issue's going to be there's no foundation to support his opinion.

THE COURT: Well, I note your objection, but I'll let the officer testify.

THE WITNESS: Can you repeat the question?

BY ATTORNEY HABERMAN:

Q Sure. What did Mr. Swenson report to you?

A He was concerned about the defendant's current status. He told me he had received a call from relatives of the defendant that he had made some suicidal statements. Mr. Swenson said that he had previously resided with the defendant within a matter of just days I believe, and the defendant had moved out to an apartment sort of across the alley from where he was currently living.

And he said that he had seen Mr. Mitchell after receiving that phone call. He looked out his window, saw Mr. Mitchell carrying a bag of garbage and throwing the bag of garbage into the backyard and having some stability and balance issues as well.

Q Let me just stop you there, Officer. You made a couple references there to a person by the name of **[6]**

Mr. Mitchell and the defendant. Did you ultimately have contact as part of your investigation with a person by the name of Gerald Mitchell?

A Yes I did.

Q Do you see that person in court today?

A Yes I do.

Q Can you identify him by what he's wearing and where he's seated?

A He's wearing a red jumpsuit sitting at the defendant's table.

ATTORNEY HABERMAN: Your Honor, let the record reflect

ATTORNEY WINGROVE: I will stipulate to the same. It's pretty obvious.

ATTORNEY HABERMAN: Thank you.

THE COURT: All right. The record shall reflect Mr. Mitchell's identification.

BY ATTORNEY HABERMAN:

Q And when, Officer, you were referencing the defendant about statements made by Alvin, was he talking about Mr. Mitchell?

A Yes.

Q Okay. What did Alvin indicate to you that Mr. Mitchell was doing outside after he got rid of that garbage?

[7] A He Stumbled in his words stumbled in and appeared to be highly intoxicated from the window that he could see him down there, and he got into a gray van.

Q And did -

ATTORNEY WINGROVE: Just for the record I'm going to renew the objection as to the opinion evidenced by Alvin Swenson. I don't know who this guy is. I don't know what his basis for deciding anyone was intoxicated was.

THE COURT: That's argument. I'm okay with the argument. But hearsay is admissible, and I don't have a problem with the officer testifying to what Mr. Swenson told him.

BY ATTORNEY HABERMAN:

Q Did Mr. Swenson indicate whether or not the defendant left the residence in his van?

A Yes. As the driver.

Q And did you have an opportunity to speak to the defendant's mother, Carol?

A Yes.

Q And why -- how is it that you came to Carol's residence? And I just want to be a brief statement is all I'm looking for just to explain the chronology of how you ended up there.

[8] A I merely spoke to her over the telephone.

Q And why is it that you spoke to her?

A She was the registered owner of the van that he would have left in.

Q And did Carol say anything to you about the defendant using the van?

A She was not aware he was using it and that he was intoxicated.

Q Did she make any statements about him being

in possession of her van?

A I don't recall specifically.

Q When you referenced the gray van that was described by Mr. Swenson, were you able to receive any sort of license plate or anything like that?

A Yes.

Q How is it that you received that?

A Through his mother, who's the registered owner, and checking previous records and DOT records through the computer in the squad.

Q And you said his mother, so that would be the defendant's mother?

A That's what I believe, yes.

Q Ultimately where did you locate the defendant?

A The defendant was walking back towards his residence from further north on North Eighth **[9]** Street. Apparently he had been following or causing some type of a commotion that one of our community service officers had located him near the funeral home just about a half block north of us.

Q And what, if any, observations did you make about the defendant that day?

A The defendant appeared to be intoxicated. He had great difficulty in maintaining his balance. He was nearly stumbling. I had to put my arms out to grab onto him at one point to keep him from stumbling. As we were standing still he would kind of walk backwards a bit in an attempt to keep his balance. And I noted that his clothing was wet and covered in sand.

Q Did the defendant make any statements about

where the van was?

A He said he parked it by the beach.

Q Did he say why?

A He said he was too drunk to drive.

Q And did the defendant make any other statements about drinking?

A He initially told me that he was drinking in his apartment and that he was not drinking down at the beach. However, he would change his story and go back and forth on that.

[10] Q And were you able to identify what -- where his apartment was at this point?

A Yes.

Q What was that?

A 721 St. Clair Avenue, Number 4, I believe. It would have been directly across the alley.

Q Are you sure that it was 721?

A Not specifically, no. I just believed it was somewhere in the 700 block of St. Clair Avenue.

Q And would that be consistent with the description provided by Mr. Swenson as to his ability to see the nearby residence?

A Yes.

Q Was this vehicle or van located?

A Yes.

Q By who?

A Officer Stephen.

Q And what did he tell you, if anything, about

that van?

A It was parked on the side of the road, and there appeared to be some fresh scratches and damage to the driver's side mirror area.

Q Did that van have the same Wisconsin registration as the van registered to the defendant's mother?

A Yes.

[11] Q Did that match the description of the van that was provided by Mr. Swenson?

A Yes.

Q In your contact with the defendant occurred roughly how long after your -- the original complaint you took from Mr. Swenson?

A I believe it was, like, a half hour, 45 minutes maybe.

Q Okay. When you had contact with the defendant did you put him through any field sobriety tests?

A No.

Q Why is that?

A He was quite hostile towards officers. Based on the fact that we had gotten information that he was suicidal and things like that, I conducted a frisk of his person for weapons for my safety and his. I noted that his clothing was wet. And as I continued my search I -- the defendant objected and kind of spun around on me, you know, hey, you can't do that, you know. He was very -- not just objecting to a search or a frisk of his person but he was quite belligerent, boisterous, and not very compliant.

Q And was he ultimately placed into a squad car?

A Yes.

[12] Q By who?

A Me.

Q And were you able to do it alone?

A What's that?

Q Were you able to do that alone?

ATTORNEY WINGROVE: I'm going to object as to relevancy.

ATTORNEY HABERMAN: Judge, I think there would be some relevance by -- if I can have a little leeway on a couple questions here.

THE COURT: If where you're going is that the officer needed somebody's help because Mr. Mitchell was unstable, I think that's relevant because it relates to the felony he's charged with. If you're asking about help because he's being uncooperative, that doesn't really relate to the felony he's being charged with.

ATTORNEY HABERMAN: I would anticipate, although I don't know what the officer would testify next to, but I would anticipate that he would testify that based upon the level of intoxication he needed help to get the person in the vehicle.

THE COURT: If you want to ask the officer that question go ahead.

[13] BY ATTORNEY HABERMAN:

Q Officer, why did two officers have to put the defendant in the squad car?

A Because of his instability and his behavior.

Q Okay.

ATTORNEY WINGROVE: I would ask the answer then be stricken because it's just a mess in terms of what the Court directed.

THE COURT: I'll let the answer stand.

ATTORNEY WINGROVE: I'm sorry?

THE COURT: I'll let the answer stand.

ATTORNEY WINGROVE: Thank you.

BY ATTORNEY HABERMAN:

Q After the defendant was placed in the squad car what happened next?

A I drove him to the Police Department.

Q And at the Police Department what happened next?

A He became, I guess for -- he was so intoxicated or under the influence of something or having some type of a medical concern that he could no longer stand. He was slouching down in his chair almost becoming unresponsive.

And because I was going to be at the Police Department continuing my OWI investigation, I made contact with supervision who also noted his **[14]** behavior and current condition and was asked just to bring him up to the hospital rather than deal with him in our booking area.

Q And which, if any, hospital did you go to?

A Memorial Hospital in the city of Sheboygan.

Q And while at Sheboygan Memorial Hospital did you have the opportunity to read the Informing the Accused to the defendant?

A I did. However, he was unconscious at that point.

Q And ultimately as a result of his unconsciousness was he able to respond or give you any sort of indication?

A He did not.

Q And was a blood draw then conducted of the defendant?

A Yes.

Q I'm not sure if I covered this so I want to make sure I do. Did you notice any sort of glassy eyes, slurred speech, or an odor of intoxicants, all of which would be things we might typically see in this scenario?

A I noticed each of the identifiers you described.

Q And was that -- those observations throughout your entire contact with the defendant?

A For the most part. Once -- when I actually started **[15]** getting him up to the hospital and pulling in the parking lot, I noticed that he was now slumped over in the back seat of the car completely unresponsive, refused to answer or could not answer any type of questioning or stimulation to get him to talk to me.

At that point he was loaded into a wheelchair with the assistance of another officer, and we brought him in basically incapacitated and unconscious, and he remained in that condition throughout the rest of my time there.

Q And ultimately are you aware if the blood draw that was conducted was sent to the State Laboratory

of Hygiene?

A Yes.

Q And did you receive a report from that?

A Yes I did.

Q Okay.

ATTORNEY HABERMAN: Your Honor, I am going to have at this time Exhibit 1 marked.

BY ATTORNEY HABERMAN:

Q Officer, I'm showing you Exhibit 1. Do you recognize this?

A Yes I do.

Q What is it?

[16] A It's a laboratory report from the Wisconsin State Lab of Hygiene.

Q Is this the laboratory report you received in this case?

A Yes it is.

ATTORNEY HABERMAN: Thank you. Your Honor, I would move for the admission of that Exhibit Number 1. I would also move for the admission of Exhibit 2, which I have now had marked with your clerk. Exhibit 2 is a certified driving record.

THE COURT: All right. Mr. Wingrove, have you seen Exhibit 1 and 2?

ATTORNEY WINGROVE: Yeah. I'll make objections to 1 as a foundation of hearsay; 2 I can't object to.

THE COURT: All right. I'll accept 1. It is a hearsay document, but it's a preliminary hearing, so

I'll accept it.

Any other questions for Officer Jaeger?

ATTORNEY HABERMAN: No.

THE COURT: And Mr. Wingrove.

ATTORNEY WINGROVE: Thank you.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Before court today I notice you were reviewing some [17] document; is that correct?

A Yes.

Q Would that have been a nine-page police report dated 6-28-13, incident number C1310171?

A I believe so, yes.

Q Do you have that document handy? Could you take a look at it?

A I don't have it with me. It's at the --

ATTORNEY HABERMAN: Your Honor, I do have it. He left it at the table with me. I'll show it to Attorney Wingrove.

ATTORNEY WINGROVE: Would you show it to the witness please? Thank you.

THE COURT: I like team work.

ATTORNEY HABERMAN: Your Honor, let the record reflect that I did provide Officer Jaeger's report to him at the request of Attorney Wingrove.

ATTORNEY WINGROVE: And I'll try to repeat the question. Forgive me if I don't do it quite accurately.

BY ATTORNEY WINGROVE:

Q Before court today I noticed you reviewing a document. Was that a nine-page report by the Sheboygan Police Department dated 6-28-13 referencing incident number C13-10171?

[18] A Yes it is.

Q Now, as a police officer you've received some training in how to respond to calls concerning people with-mental illness?

A Some, yes.

Q If someone's suffering from -- if someone's suicidal is it possible they're suffering from depression?

A It's possible.

Q Could be, yeah. And does depression sometimes affect people's movements and gait, the way they walk, the way they act?

A Maybe the way they walk. I'm not sure on the others.

Q Okay.

A Or I'm sorry, the way they act. Not the others.

Q And at some time during this incident you said there was some medical concerns?

A Yeah. I mean, I wasn't so concerned of medical concerns at the time that I first came into contact. But once I was transporting him to the hospital then his condition increasingly became worse.

Q Sure. And did you ever at any time believe that this was a suicide attempt?

[19] A I did not know at that time.

Q Okay. Were you concerned about it 'cuz after all that's why you were called out.

A It was a concern, yes.

Q Okay. Now, apparently you didn't receive the phone call. Dispatch received the phone call from Swenson?

A Correct.

Q Okay. And about how long did it take you to get to 723 St. Clair?

A I'm not exactly sure.

Q Take a stab at it please.

A There's various parts of the city that I could be coming from. I don't remember where I responded from.

Q Okay. So it might have been five minutes. It might have been ten minutes. It might have been twenty minutes?

A Probably five to ten tops I would think.

Q Okay. And you spoke to Swenson. And then about half hour, 45 minutes later you became aware of someone that was subsequently identified as the defendant at Eighth and St. Clair, right?

A Yes.

Q Okay. And how -- and actually just before you saw [20] him you said that he was walking back from further north towards Eighth, right?

A Just north of our location, yes.

Q Okay. How far away is that from the defendant's apartment?

A About a half block I think 'cuz it was the -- I believe it was the alley just north of the funeral home that's right there. Eighth and St. Clair is where he was observed by our community service officer.

Q When you say the alley just north of the funeral home, could you please tell me which quadrant is it in? Is that, like, the northwest, southwest? What corner of Eighth and St. Clair?

A It would be the northeast corner.

Q The northeast corner. And this is on Eighth, right?

A Right.

Q Okay. So that would be about a half block from the defendant's apartment, correct?

A About a half block.

Q Okay. Now I'm going to read you something and it's -- I'm going to page 3 of the incident report. Starting at the bottom of the page, last sentence. (As read) "I asked Gerald where his van **[21]** was, comma, and he told me, quotations, I parked it by the lake, period. I figured I was too drunk to drive, period, quotation mark. I asked if he had been drinking down at the lake or if he had been drinking intoxicants after he left his apartment, comma, and he replied twice, comma, paren, no, period, closed paren. He admitted to me he had been drinking intoxicants in his apartment, comma, but would not tell me who he was drinking with."

And then going a little bit further down. "It was here that I continued to further conversation with Gerald and he admitted to me that he had, comma, in fact, comma, consumed approximately four shots of

vodka while down at the beach, period."

Now, does that accurately state what's in your report?

A Yes.

Q Does your report actually state the questions you asked Gerald and his answers?

A What do you mean? If you're asking if my report is accurate, yes.

Q Okay. That's what I'm asking. So did you ask him if he was drinking alcohol by the lake after he left his apartment, right?

[22] A Yes.

Q Did you ask him if he went back to his apartment after he left the lake?

A No.

Q So for all you know as you sit here today he drove down to the lake, parked his van, had something to drink, walked back to his apartment, drank some in his apartment, and then went for another walk, and was walking around somewhere north of Eighth Street when you became aware of him?

ATTORNEY HABERMAN: Judge, I'm going to object. I think that's a nice closing argument that he can make at a jury trial, but at today's hearing we have a preliminary hearing with just probable cause. There are some inferences that would support his argument but also another argument.

ATTORNEY WINGROVE: I guess the purpose of a probable cause is for the State to adduce evidence to tell a plausible story that a felony had been

committed. Now --

THE COURT: I don't have a problem if the officer answers the question.

THE WITNESS: Can you ask the question again?

ATTORNEY WINGROVE: Okay.

[23] BY ATTORNEY WINGROVE:

Q For all you know -- I'll break it down. So Gerald told you he drove down to the lake and he had a couple of drinks, right?

A Yes.

Q He told you he parked his van because he figured he shouldn't drive, correct?

A Correct.

Q He then -- we know that he left the lake and presumably walked back, correct?

A I assume so.

Q And we don't know whether he went to his apartment or not, do we?

A I was at the apartment knocking on the door there looking to have him come to the door to see if he was inside at all.

Q Do you know whether he was in there or not?

A I don't. Nobody came to the door.

Q You know he doesn't like police officers apparently, correct?

A I don't know that.

Q You said he was really hostile when you went to talk to him. He didn't like the officers.

A Okay.

Q So you don't know whether he was in there or not, [24] do you?

A No.

Q And if he had something to drink in his apartment that could have been at that time, correct?

A I think that's plausible.

Q Yeah. Half hour's a lot of time, 45 minutes. And then you became aware of the community service officer became aware he was somewhere north of the apartment, correct?

A Yes.

Q And just so I'm clear. On follow-up investigation did you ever have reason to believe this was a suicide attempt?

A Through my conversation with Mobile Crisis they said they had made a visit to him while he was up in the ICU at the hospital and that there wasn't any other sanctions in place regarding his behaviors.

Q What does that mean?

A It means that it didn't seem that there was a suicide attempt from my standpoint. And in talking with Mobile Crisis they appeared to feel the same.

Q And just so we're clear the defendant was unresponsive when you read him his Informing the Accused, right?

[25] A Yes.

Q Was that before or after the blood draw?

A It was before the blood draw.

Q Let's talk about the van for a minute, okay? That was recovered in the 300 block of Michigan, correct?

A I believe so. That's what I was told.

Q And that's pretty close to the lakeshore, isn't it?

A Yes.

Q As a hypothetical -- and perhaps the State is going to object -- if someone said they went to the Slovenfest last weekend and they saw a car parked and they parked their car in the 300 block of Michigan to go to the festival, would that surprise you? Would that seem odd? Or the way things typically happen?

A You're asking if somebody was going to the beech if they would park their car in the 300 block of Michigan Avenue? Is that what you're asking?

Q Yeah. Does that often happen?

A That happens.

Q Did you record your interview with the defendant initially?

ATTORNEY HABERMAN: Objection, Judge. That's irrelevant.

[26] THE COURT: I'll sustain the objection.

ATTORNEY WINGROVE: No further questions.

* * *

State of Wisconsin
Circuit Court
Sheboygan County

State of Wisconsin,
Plaintiff,

v.

Gerald P. Mitchell,
Defendant.

Case No. 13 CF 365

Before the Honorable Terence T. Bourke
October 16, 2013

Transcript of Proceedings

* * *

[3] THE COURT: This is case number 13 CF 365, State versus Gerald Mitchell. He's here with Attorney Charles Wingrove. Nathan Haberman is here for the State.

This is a motion challenging the blood draw. And

Mr. Wingrove, apparently you just handed me something. Does this relate to this motion?

ATTORNEY WINGROVE: Yes it does, Your Honor. When I had first appeared with Mr. Mitchell and advised the Court we were going to bring a suppression motion, I also advised the Court that relying on DHS 92 and 42 CFR part two, we were going to argue that the proper procedure is to disclose the information from the hospital, those records, hasn't been followed, and that becomes another reason for suppression.

THE COURT: So it really has nothing to do with the facts behind the motion.

ATTORNEY WINGROVE: It's -- I hope to develop a very few facts at the hearing in support of it. And it's just another way of addressing the issue of they should have got a warrant for the blood draw.

THE COURT: All right. Mr. Haberman, go ahead.

ATTORNEY HABERMAN: Thank you, Your Honor. The State would call Officer Alexander Jaeger.

[4] ** *OFFICER ALEXANDER JAEGER,* **

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: State your name and spell your last name.

THE WITNESS: Officer Alex Jaeger,

J-A-E-G-E-R.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Jaeger, how are you employed, sir?

A City of Sheboygan police officer.

Q And how long have you been a police officer for with the City of Sheboygan?

A At the City about five years.

Q Do you have any other law enforcement experience beyond the City?

A I have approximately three years prior with the Sheboygan County Sheriff's Department as a patrol deputy.

Q So is that about eight years in total?

A Yes.

Q And in your eight years of law enforcement experience have you conducted investigations regarding people who are intoxicated due to the [5] consumption of alcohol or other drugs?

A Yes.

Q And what is your training regarding that?

A State certification in the administration of standardized field sobriety tests.

Q And have you in your training received the certification using the National Highway Transportation Safety Administration standard?

A Yes.

Q And as part of your law enforcement career about how many investigations have you been involved in that surround an OWI?

A Involved in? I would say well over two hundred.

Q And are you trained to use the preliminary breath test?

A Yes.

Q Directing your attention to May 30, 2013, at about 3:17 p.m. did you receive a dispatch?

A Yes I did.

Q And you were working at this time as a law enforcement officer?

A Yes.

Q And what was the dispatch in regards to?

A Check welfare complaint.

Q And where were you supposed to go?

[6] A An address on North 7th Street near - correction -- North Eighth Street near St. Clair Avenue. I don't recall the specific address number.

Q In any event that's in the city of Sheboygan, county of Sheboygan, state of Wisconsin?

A Yes.

Q And what information were you provided with prior to arriving there?

A Check welfare complaint, checking the welfare of a male subject.

Q Were you given a name?

A I don't recall if I was specifically given a name at that time.

Q And when you arrived at that location near North Eighth Street and St. Clair, who did you speak to, if anyone?

A I spoke with the complainant, Alvin Swenson.

Q What did Alvin indicate to you about the person's welfare?

A Alvin indicated that he had received a telephone call from Gerald Mitchell's mother concerned about his safety as he had made a statement about his personal well-being to her. Alvin further went on to tell me that he shortly thereafter went to his [7] window and observed Mr. Swenson -- I'm sorry -- observed Mr. Mitchell exiting the apartment behind where he lives, and he appeared to be very disoriented.

Q Did Alvin describe the nature of his relationship or familiarity with Mr. Mitchell?

A Yes. He said the two had recently resided together.

Q And what did Alvin describe about what he observed involving Mr. Mitchell's activities?

A He said that Mr. Mitchell had in his words appeared intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty in maintaining balance, nearly falling several times before getting into a gray minivan and driving away.

Q And --

ATTORNEY WINGROVE: I'm going to object. I understand this is for a probable cause determination, so I'm assuming it's not being offered for the truth of the matter asserted, just that's what Mr. Swenson said.

ATTORNEY HABERMAN: Well, Judge, even if it is offered for the truth of the matter, hearsay doesn't apply at this kind of motion hearing. It is a

motion under 901.04, and it's a question concerning the admissibility of evidence.

[8] So the Court is not bound by the rules of evidence, and that would include hearsay.

THE COURT: I got to say you two are both talking over my head. Start again, Mr. Wingrove.

ATTORNEY WINGROVE: I was assuming that the testimony's being offered for the purposes of establishing probable cause.

THE COURT: That's correct.

ATTORNEY WINGROVE: Then I was going to make a point that it shouldn't be received for the truth of the matter asserted. This step of the hearing, as I see it, is about whether the officer developed enough facts to get probable cause to arrest the defendant.

THE COURT: No. I agree with that. What's your objection to that, Mr. Haberman?

ATTORNEY HABERMAN: Your Honor, I think it can be offered for the truth of the matter and, that is, did Alvin say that and did Alvin see that. And the reason it can be offered for that is because the hearsay rule doesn't apply at this type of hearing because it's a question concerning the admissibility of evidence.

THE COURT: Right. But I can't make a finding that Mr. Mitchell's drunk because of what Alvin Swenson said.

ATTORNEY HABERMAN: It's not going to be the [9] only fact, but it could be a factor.

THE COURT: I know. I think you two are talking

about different issues.

ATTORNEY HABERMAN: Okay.

BY ATTORNEY HABERMAN:

Q Officer, after you received that information from Mr. Swenson, were you able to communicate with other law enforcement officers and locate Mr. Mitchell?

A Yes.

Q And tell me about how soon after your conversation with Mr. Swenson did you locate Mr. Mitchell?

A Approximately a half hour.

Q And describe how you came in contact with Mr. Mitchell.

A As I was outside in my squad, a community service officer who works for the Police Department was also in the area and had located a male subject matching the physical description that I had provided out to other officers walking towards us about a block, half a block away. He appeared intoxicated and was possibly bothering a female pedestrian.

Q And before -- I should have asked this question before we went to that one. Before you located **[10]** Mr. Mitchell did you have contact with his mother, Carol Mitchell?

A Yes.

Q And what was the nature of that contact?

A I was concerned about the statement that Mr. Swenson had said. He had told me that his mother had called him concerned about a conversation she had with Mr. Mitchell over the phone. He made some

vague statements about potentially harming himself, and she was concerned about that. And I also needed to obtain the vehicle information that she had -- I learned she had actually owned the van that Mr. Mitchell had driven away in, and she provided me a license plate.

Q So the information that Ms. Mitchell provided you regarding a van that Mr. Mitchell drives, was that consistent, inconsistent, or something else with the information you received from Mr. Swenson about the van he observed the defendant get -- or Mr. Mitchell get into?

ATTORNEY WINGROVE: I'm going to object. That sounds like we're having one witness, one hearsay witness testify as to the credibility of another hearsay witness.

[11] THE COURT: I didn't take it that way.

ATTORNEY WINGROVE: You're the judge.

THE COURT: Well, it's corroborating evidence. We're talking about the officer's state of mind for probable cause. I don't have any problem overruling your objection. So go ahead.

BY ATTORNEY HABERMAN:

Q Do you need me to ask that question again, Officer Jaeger, or do you understand that?

A Please ask again.

Q The description of the van that was provided by Ms. Mitchell, did that match, was that -- I'm sorry -- was that consistent, inconsistent, or something else with the description of the van that Mr. Swenson provided you?

A It was consistent, a gray van.

Q Okay. When you had contact with Mr. Mitchell, what did you notice about his demeanor?

A He was slurring his words, stumbling. He was wearing jeans but no shirt, was wet, and he had a large amount of sand on his body similar to if you had gone swimming in the lake.

Q Did the observations you made of Mr. Mitchell provide any indication to you about intoxication?

A Yes.

[12] Q Describe that.

A He was slurring his words. He had great difficulty in maintaining balance, nearly fell several times to the point where another officer and myself had to extend our arms out to ensure he wouldn't fall. When the transition when I actually brought him across the street to the sidewalk area so we were out of traffic, he nearly fell after stepping up and over the curb. And he admitted actually that he had been drinking.

Q Do you see Mr. Mitchell in court today?

A Yes I do.

Q Can you describe him for the Court by what he's wearing and where he's seated please?

A Red jumpsuit at the defendant's table.

ATTORNEY HABERMAN: Your Honor, let the record reflect identification please.

ATTORNEY WINGROVE: We'll stipulate for today's purposes.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q And Officer, you indicated the defendant made some statements about drinking. Describe that for us. What did he say?

A He admitted initially that he had been drinking. He was drinking in his apartment. And would not tell me if **[13]** he was drinking with anyone or who anyone -- who it would be that he was drinking with. And he said that he had been drinking just prior to our contact.

Q And as a result of his drinking what, if anything, did he say about the specific items he was drinking or numbers of drinks?

A He had later changed his story that he was drinking down at the beach, that he parked his car on Michigan Avenue because he felt he was too drunk to drive, and that he had four shots of vodka.

Q At that point had you received any information about any prior convictions for the defendant regarding operating while intoxicated?

A I don't recall if it was at that point or after.

Q At some point you received information about that.

A Yes.

Q Did the information about prior convictions factor into your decision on arresting him at all?

A Yes.

Q Correct me if I'm wrong, does that mean you received the information prior to the arrest?

A Yes.

Q Okay. Do you know -- if it wasn't at that moment, **[14]** do you know when it would have happened?

A Not specifically, no.

Q Did you have any other officer check for the gray van?

A Yes.

Q And was the gray van ever located?

A Yes it was.

Q Describe who did what.

A Officer Stephen had located the van parked on Michigan Avenue. I believe it was in the 300 block.

Q Were you provided any information about whether or not there was any damage to that vehicle?

A He indicated -- Officer Stephen did -- that there was some minor damage that appeared to be fresh I believe to the side mirror area.

Q And were you able to confirm that this is the same van that was discussed by Ms. Mitchell earlier?

A Yes. And that was by vehicle registration.

Q Okay. Did you have the defendant submit to any standardized field sobriety tests?

A No.

Q Why is that?

A Based on his current condition he was stumbling, could barely stand without being held, and I didn't **[15]** feel it would be safe for him to perform those tests.

Q Did you have any preliminary breath test

performed?

A Yes.

Q When -- at what point was that done?

A Just prior to the arrest.

Q And would that have been then on the street where you had initial contact with him?

A He was actually brought over to the front of my squad car where I performed the test. Or administered the breath test.

Q I'm not sure if we established this earlier, but where in -- where did you have the contact with him?

A It was on St. Clair Avenue just east of the intersection of Eighth Street and St. Clair Avenue.

Q And that's, again, in the city of Sheboygan, Sheboygan County, Wisconsin.

A Yes.

Q And if someone were to walk from the lake to the location where Mr. Swenson described seeing Mr. Mitchell, would they have to go through the location that you guys were in?

A I'm sorry, can you repeat the question?

Q Sure. If someone's in Sheboygan -- you're familiar **[16]** with the city?

A Yes.

Q In Sheboygan if someone's down by the lake, near Michigan Avenue and the lake, if they want to get back to the area where Mr. Swenson described initially seeing Mr. Mitchell, and you said that Mr. Swenson was near Eighth and St. Clair looking out a window when he saw Mr. Mitchell would they have

to walk through the location where you currently are having contact with Mr. Mitchell to get there?

A Potentially. I mean, we were probably 30, 40 feet west of his residence where he actually was on the Eighth Street side, and the lake would be from his residence to the east, and he lives 700 block of St. Clair Avenue.

Q Okay. When you administered the preliminary breath test what was the result?

A .24.

Q As a result of the arrest and your observations -- as a result of the preliminary breath test and your observations of the defendant as well as his statements, what did you do?

A Make an arrest for operating while intoxicated.

Q And what, if anything, did you do next?

[17] A He was placed in the back seat of my patrol vehicle, and I brought him to police headquarters for further processing.

Q Where is police headquarters?

A North 23rd Street in the city of Sheboygan.

Q And about how long generally would it take you to get from where you initially had this contact with Mr. Mitchell to the time you got to the Police Department?

A About five minutes maybe.

Q And what, if anything, did you notice about the defendant's condition during this time?

A It was declining.

Q What do you mean by that?

A He was becoming more lethargic in his movements, had greater difficulty in maintaining balance, had to be physically helped out of the squad car when we got there. And once he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation. And based on that condition, I didn't feel that a breath test would be appropriate. After talking to my lieutenant, we decided that a blood test would be more appropriate, and I brought him to Memorial **[18]** Medical Center.

Q And again, about how much time passes by the time you get to Memorial?

A From the time I left the police station?

Q Yes, sir.

A Eight minutes maybe.

Q And when you arrived at Sheboygan Memorial where was Mr. Mitchell at that point?

A He was in the back seat of my squad.

Q What, if anything, did you notice about his condition at that time?

A He appeared to be completely incapacitated, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair. Myself and another officer had to lift him into the wheelchair as he could not hold himself up, would not wake up, and his eyes were closed.

Q Describe the efforts you made to try to wake him up.

A I would shake his arm, lift up his hands, shake his hands, rub the top of his head.

Q Did he make any statements to you?

A Not at that point, no.

Q And how did you get him from the squad car into Sheboygan Memorial?

[19] A By a wheelchair. I pushed him.

Q And while he was in the wheelchair, what was his posture like?

A He was slumped over in the chair, could not lift himself up with any type of, like, sitting in a normal position.

Q And what did you do next?

A I completed the blood evidence paperwork. It's standard procedure. And I read him the Informing the Accused form verbatim from the form. He was so incapacitated he could not answer.

Q I'm going to have marked, Officer, Exhibit 1.

ATTORNEY WINGROVE: I think we should mark it as Exhibit 2 because I have an offer of proof I brought in as Exhibit 1 a while ago. Would just be a cleaner record.

THE COURT: That was brought in on a different day.

ATTORNEY WINGROVE: Absolutely.

THE COURT: Why don't we just call it 1A.

BY ATTORNEY HABERMAN:

Q Officer, I stand corrected. I'm going to show you what's been marked as Exhibit 1A. Can you identify this, sir?

A Yes I can.

Q What is it?

[20] A This is the Informing the Accused form, a copy of it, that I had read to Mr. Mitchell. After reading through the form, he was so incapacitated that he could not answer the question of "Will you submit to an evidentiary chemical test of your blood?"

Q And Officer, is that the actual form you completed in this case?

A Yes.

Q Exhibit 1A has several paragraphs here towards the top that are computer printed. Do you see that?

A Yes I do.

Q Did you read these paragraphs verbatim to the defendant?

A Verbatim, yes.

Q And when you got to the point of the second half or the lower portion of this form, is this your handwriting on the form?

A Yes it is.

Q And is that your signature in the lower right corner?

A Yes it is.

Q And is there an indication as to the date and time that this form was completed?

A Yes there is.

Q What is that?

[21] A Dated 5-30 of '13 at 1724 hours.

Q And do you recall when your arrest was made?

A No I don't.

Q I'm going to show you what's going to be marked as Exhibit 2. Showing you Exhibit 2. Do you recognize this, sir?

A Yes I do.

Q What is that?

A This is the Alcohol Influence Report.

Q And did you complete that in reference to this case?

A Yes I did.

Q And is that your handwriting on the form?

A Yes it is.

Q Is that a true and accurate copy of the form that you completed in this case?

A Yes it is.

Q And in that form does it indicate your arrest time?

A Yes it does.

Q And what time is that?

A 4:26 p.m.

Q And when you compare your arrest time to the time of reading the Informing the Accused, what's the difference there?

A Approximately one hour.

[22] Q Based upon your recollection of the incident, does that time frame sound about right from what you testified --

A Yes.

Q- to in terms of the arrest, going to the Police Department, and then ultimately going to Sheboygan Memorial?

A Yes.

Q And what did you write down as a response on Exhibit 1A in reference to will he submit to an evidentiary chemical test?

A "Couldn't speak slash incapacitated."

Q And did you mark a box?

A Yes I did.

Q And what was the box?

A Yes.

Q And as a -- on Exhibit 2 of the Alcohol Influence Report, did you indicate anything in reference to the preinterrogation warning section? In other words, when you asked -- did you ask any questions about drinking history after he was arrested?

A No I didn't.

Q Why was that?

A He was incapacitated.

Q And is that indicated on Exhibit 2?

[23] A Yes.

Q How?

A I wrote the words "incapacitated" across the signature field.

Q Just so I am clear and the record's clear, when you say incapacitated, what are you talking about?

A He physically could not answer, was not awake, was not alert.

Q And Officer, did you summon the -- strike that. After reading the Informing the Accused and the defendant didn't respond, what happened next?

A Blood evidence was obtained by the phlebotomist at the hospital.

Q And did you call for any other assistance in relation to the defendant's physical status?

A I didn't specifically request it. I had made mention of his current condition to hospital staff. Perhaps the amount of time between the time of arrest and the time the form was completed I do recall that, you know, medical efforts were being attempted at the same time that I was waiting for the phlebotomist. I recall that Mr. Mitchell was so incapacitated and couldn't answer any hospital staff as I stood next to him as well and did not awake while they placed catheters or any other type **[24]** of medical instruments on him.

Q I'm going to show you what's been marked as Exhibit 3. And Officer, I want to clarify with you this Exhibit 3 before you go over and identify it. You can see Exhibit 3 is two pages. It's a front and back, right?

A Yes.

Q The front I'm going to ask you to talk about. The front is identified as having the exhibit sticker. The back I'm not going to ask you any questions for. It's unfortunately just a lack of doing a good job of copying on my part.

ATTORNEY WINGROVE: And just so the record is clear, we would for reasons I'll explain otherwise, we would object to the back part of the document being received into evidence.

THE COURT: What is Exhibit 3?

ATTORNEY WINGROVE: That would be the WSLH laboratory report.

THE COURT: Do we really need the lab report?

ATTORNEY HABERMAN: What Attorney Wingrove -- the lab report is the part that we're not going to talk about.

ATTORNEY WINGROVE: Why don't I give you my file copy of that document, and it won't have the lab report **[25]** on the back of it, and I'll just trade you if that's acceptable.

BY ATTORNEY HABERMAN:

Q I'm going to reshow you what's been remarked as Exhibit 3 so we don't have this problem of a back side of a page. Do you recognize Exhibit 3, sir?

A Yes I do.

Q What is that?

A This is the State of Wisconsin Blood/Urine Analysis form that is completed during the blood draw.

Q And in fact, do you complete part of that form?

A Yes I do.

Q What part?

A The upper portion, parts that are listed A, part B, and part C.

Q And is this the form that you completed in this case?

A Yes it is.

Q At what point in the process do you complete

this form?

A Just prior to the blood draw.

ATTORNEY WINGROVE: And again for the record I have no objection to the form being received for what the officer did and what he said. But the parts of the form that are filled out by someone else, we would be objecting to them **[26]** being received as I don't think the appropriate steps have been taken for that information to be disclosed or redisclosed.

THE COURT: I really don't understand why there's an objection. I think all we're here today is whether or not there was a violation of Mr. Mitchell's rights when the blood was drawn. Isn't that the whole issue?

ATTORNEY WINGROVE: Yes. But again, I'm going to take this in a slightly different direction and suggest that the blood draw made at the hospital by the hospital staff under the facts and circumstances as they then existed is subject to confidentiality under the federal rules brought by 92 DHS.

THE COURT: I'm hesitating because that's -as I read your motion, that's not what I understood this to be today.

ATTORNEY WINGROVE: That is correct. The motion is a straight suppression motion. But I did alert the Court that I was going to be making this argument, and this is an extension of the motion saying they should have had a warrant to get that blood. And now the argument's going to be because that blood draw is subject to federal confidentiality rules.

THE COURT: I'll receive it the way it is. I've never had a motion like this before. I'll receive the

[27] exhibit as it stands. If I look at it and I see something in the document that appears that it should not have been admitted, then I'll reconsider, but I'll accept it the way it stands.

ATTORNEY WINGROVE: I understand the ruling. I just ask the record reflect a continuing objection.

THE COURT: That's fine.

BY ATTORNEY HABERMAN:

Q Officer, are you present when anyone else completes parts of that form?

A Yes.

Q And what part would that be?

A Part D and part E.

Q And what is part D generally?

A The type of specimen that is being collected, the collection date, and the collection time.

Q And the person collecting is on there too?

A Yes.

Q And what's the person's name on the form?

A Jennifer Gatzke.

Q Was -- based on your recollection was that the person who collected the blood in this case?

A Yes it was.

Q And is there a time that's indicated as to when the blood was collected?

[28] **A** Yes there is.

Q When is that?

A 1759 hours.

Q Based on your recollection and your presence during completing this form and Ms. Gatzke completing this form, is that time accurate?

A Yes it is.

Q When -- did Ms. Gatzke collect the blood of the defendant?

A Yes.

Q And was that blood turned over to you?

A Yes it was.

Q Okay. Do you recall what was going on at the time that the blood draw was being performed in terms of medical treatment, if any?

A At the specific time I believe he was just being monitored at that time. I don't know of any other medical procedures being done.

Q You mentioned at one point in your testimony about a catheter. Do I understand right?

A Yes.

Q Okay. Tell me about what happens when you're at the hospital then. Take me through this to the blood draw moment. Do other hospital staff get involved in medical treatment prior to the blood [29] draw?

A Yes.

Q Okay. Tell me about what you saw generally. I'm not interested in the very specifics, but who's doing what at what time?

A I recall specifically one nurse inserting a catheter into his penis attempting to obtain a urine.

Other than that I'm not a medical professional. I don't recall specifically what other procedures were done.

Q Were people working on him other than that?

A No. They were basically just monitoring him during that time frame.

Q And I just want to make the record clear on this 'cuz I'm just trying to picture this in my mind. When you guys arrive at the hospital, is it like you're going to an emergency room treating someone who has just been injured, or is it like you're doing an OWI investigation, or something else?

A Doing an OWI investigation. However, it was unusual that he was incapacitated to the point that he was. Medical staff were monitoring his condition. They were certainly aware of his condition. And -- yeah.

Q Did you guys go into an emergency room, or did you **[30]** go into a different room where a blood draw is done?

A This is done in an emergency room where typically all the other emergency -- I'm sorry – the emergency room is used for the blood draws itself.

Q Okay. You went to the room where the blood draws are normally done.

A They're typically done right in the room we go in. It's -- typically there's one room we usually use. However, we were in the room next to that one because of his condition.

Q Okay.

ATTORNEY HABERMAN: I don't have

anything further, Judge.

THE COURT: Thank you. Mr. Wingrove.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q First I want to ask you some general questions about Alvin Swenson. Do you know Mr. Swenson at all?

A Yes. I've met Mr. Swenson.

Q How many times?

A Once I believe.

Q Did you have any other knowledge from Mr. Swenson you gained from other law enforcement?

[31] A I've known of Mr. Swenson through other investigations that I was part of, but I never met him as a result.

Q Okay. And when you say you met him once, you mean this occasion on May 30th?

A Yes.

Q Okay. What generally did you know of Mr. Swenson? Did you know if he was reliable?

A I don't have an answer for that question.

Q Did you know if he was a criminal?

A I was involved in criminal investigations with him.

Q What were the nature of those investigations?

ATTORNEY HABERMAN: Judge, I'm going to object to irrelevant for today's purposes.

THE COURT: I think the question is relevant to

a point. But it goes to Mr. Swenson's credibility and what the officer knew about Mr. Swenson.

THE WITNESS: Could you repeat the question?

BY ATTORNEY WINGROVE:

Q Did you know if Mr. Swenson was a criminal?

A Yes. I know he had been arrested.

Q Do you know whether he's been convicted?

A I don't recall specifically.

Q Do you know how many times? I'm sorry. I withdraw the question. **[32]** When you went to speak with Mr. Swenson, did you know where he was living?

A Yes.

Q What was -- what's your understanding of where he's living?

A It's a temporary living facility.

Q For what sort of individual?

A People that are released from jail.

Q Did he appear to be under the influence of any intoxicants?

A Not that I noticed. I'm assuming you mean Mr. Swenson?

Q Yeah. I'm sorry. Thank you. Yes.

A Okay.

Q What was his mannerism like when you spoke to him?

A He seemed genuinely concerned for Mr. Mitchell.

Q What does that mean? Was he excited? Was he sad? Was he happy? Was he talking fast? Was he talking slow? What were his mannerisms like?

A He was legitimately concerned. He really wanted us to go out and find him and make sure he was okay. He stressed that to us several times.

Q Now, you've been involved in numerous OWI investigations, right?

A Yes.

[33] Q You received training in OWI investigations, right?

A Yes.

Q You said you went to try to wake Mr. Mitchell up at one time, right?

A Yes.

Q What did you do?

A I shook him several times, shook his arms. Called his name.

Q Did you attempt a deep sternum rub?

A I don't believe so.

Q Is that one of the things you're trained to do?

A I don't believe I was ever trained to do that.

Q Have you ever done that?

A Not -- I mean, I've rubbed people's chests before but -- I mean, I'm not trained in the deep sternum rub that you're asking about.

Q Is that typically used to arouse unconscious people?

A It can be.

Q Have you taken anyone in to a 51.15 emergency detention in Sheboygan?

A Yes.

Q Where do you take them to?

A Memorial.

Q How about 51.45? Have you done one of those, an **[34]** alcohol detention?

A Yes.

Q Where do you take 'em to?

A Memorial.

Q Now I want to direct your attention to May 30th and just try to build a time line for a minute here if we may. You were dispatched at about 3:17, correct?

A Yes.

Q You probably arrive within about five minutes. That's consistent with your testimony at the preliminary hearing, correct?

A Correct.

Q How long did you speak to Mr. Swenson for?

A I don't recall specifically.

Q Okay. Well, let's try it this way. Say you got there about 3:22, 3:25. How soon -- when did you get the call from the community service officer?

A That was after I had talked to Mr. Swenson. I was out in my patrol car trying to find investigative information, perhaps a license plate, providing a text message on a computer or over the radio to other officers to assist in locating him.

Q So you're doing that for a while?

A It took a few minutes, yes.

[35] Q About how long?

A I don't recall. I also had a conversation with Mr. Mitchell's mother at the same time trying to gain information from her.

Q When did you first have contact with Mr. Mitchell?

A After the CSO had informed me of the suspicious individual.

Q Okay. And according to the -- I think it's Exhibit 2 -- you arrested Mr. Mitchell at 4:26. How much time did you spend with Mr. Mitchell talking to him before you arrested him?

A I don't recall specifically.

Q You think it would have been a half hour?

A I don't think that long, no.

Q Less than a half hour.

A I would think so, yes.

Q Okay. And if I told you that I reviewed the video and you put him in the back of the squad car at about 4:15, that would be consistent?

A If that's what the video said.

Q You wouldn't dispute that.

A If that's what the video says I wouldn't.

Q Okay. And then you take Mr. Mitchell to the police station. Do we know what time we arrived?

A No I don't.

[36] Q How long were you at the hospital before you read him the Informing the Accused?

A I don't recall specifically.

Q There was some mention about the room the blood
draw was done in. Is that done in the ER?

A Yes.

Q Okay. Is the ER one big room, or is it a large room with little rooms facing off of it?

A One room with a lot of little rooms facing off of it.

Q Okay. And the blood draw wasn't done in the usual blood draw room owing to Mr. Mitchell's medical condition, right?

A Yes.

Q And the medical condition was that he was unconscious, right?

A Yes.

Q And he was admitted to the hospital, correct?

A Yes.

Q And you testified that you saw at 1759 the blood draw was performed, right?

A Yes.

Q And that was about 35 minutes after you read the Informing the Accused to Mr. Mitchell, right? It's math.

[37] A Yeah.

Q 1724, 1759. The phlebotomist was an employee of the hospital, right?

A Yes.

Q And did she put identifying information on the

blood sample she drew?

A On the samples itself, the tubes?

Q Yeah.

A I believe she initials the tape that's on there.

Q And was there some sort of identifying information for Mr. Mitchell put on those? I mean, there's got to be some way to track it, right?

A Yeah.

Q So did you see that happen or not?

A I don't recall specifically, no.

Q But it's your understanding that customarily happens, right?

A I believe so, yes.

Q To establish a chain of custody. That would be correct, right? That's why that happens?

A Yes.

Q You could have gotten a warrant to draw Mr. Mitchell's blood at the hospital, couldn't you have?

A I could have applied.

[38] Q I'm sorry. Yes. You could have applied, correct?

A I suppose.

Q Police do that on a fairly regular basis, don't they?

A Now yes.

Q How long does it typically take?

A I don't know. I haven't done a warrant blood draw yet. We just started doing those.

Q It's fair to say that you watched Mr. Mitchell's condition deteriorate in front of you, right?

A Yes.

Q So if there was some sort of blood alcohol or drug curve going on, the numbers were probably getting higher, not lower, right?

A I don't know that.

Q He got sleepier and sleepier and eventually passed out in front of you, correct?

A In the back of my squad, yes.

Q Okay. Do you know if Mr. Mitchell was eventually admitted to the ICU at Memorial?

A Yes.

Q Was he?

A Yes.

Q Okay. Do you know if he was eventually admitted to 1-K at Memorial?

[39] A That's my understanding.

Q That would be a yes?

A Yes.

Q Just a moment please while I go over my notes. Okay. And the reason you take people for emergency detentions or emergency alcohol detentions to Memorial is because that's where we take them in Sheboygan County, right?

A Yes.

Q Okay. Just a few odds and ends to clean up now please. There was some questioning on direct examination that in order for Mr. Mitchell to come

back to his apartment from the lake, he would have to walk through an area where you were standing. Do you sort of remember that?

A Yes.

Q Okay. Is it fair to say -- what direction was Mr. Mitchell moving when you saw him, first saw him?

A From the north to the south.

Q Okay. So that would have been sort of parallel to the lake, correct?

A Yes.

Q So it's possible he could have come back from the lake and taken some other street other than the **[40]** street you were standing on, right?

A Yes. I did not see him on St. Clair Avenue.

Q And there's other ways to get from the lake to where you saw him than just St. Clair Avenue, right? There's a lot of other streets.

A Yes. St. Clair would be the most direct.

Q You testified when you got back to the station you spoke with your supervisor, and you decided a blood draw would be more appropriate. You remember that?

A Yes.

Q Why?

A Because of his current condition.

Q That being that he was unconscious?

A He was not unconscious quite. I mean, he was closing his eyes, and I mean, he was arousable.

Q Okay. If he was going progressively downhill in

front of you, why didn't you read him the Informing the Accused at that time?

A I don't know.

Q Were you at that time concerned that he was going to pass out?

A It was a concern.

Q Okay. One last point. You had testified that Mr. Mitchell later changed his story.

A Yes.

[41] Q You asked him questions about drinking down at the lake, right?

A Yes.

Q And he admitted to drinking down at the lake, right?

A Not initially, but yes. That's what he had changed his story to.

Q And that was the change in the story?

A Yes.

Q And you don't know whether he walked back from the lake or drove back from the lake, do you?

A He told me that he parked his car on Michigan Avenue 'cuz he was too drunk to drive.

Q And you don't know whether that was before or after he went to the lake?

A No.

Q You said he parked it by the lake. I figured I was too drunk to drive. But you don't know whether he got drunk before or after he parked his van, right?

A Right.

Q And he said he was drinking in his apartment, but you don't know whether he was drinking in his apartment before or after he went to the lake, right?

A He was -- I'm sorry, can you repeat the question?

[42] Q Sure. Mr. Mitchell said he had been drinking in his apartment, right?

A Yes.

Q And you don't know whether he was drinking in his apartment before or after he went down to the lake.

A I don't believe he was in his apartment during the time of my investigation.

Q That's because you knocked on the door and he didn't answer the door, right?

A Right.

Q And later on in your investigation it became pretty clear that he really didn't want to talk to a police officer, didn't it?

A Right.

ATTORNEY WINGROVE: No further questions.

Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Did you ever receive, Officer, any information after Mr. Swenson provided you the information of the defendant getting in his gray van? Did you receive any information after that to suggest that the

gray van never returned?

A No.

[43] Q Approximately how far in blocks or however you want to characterize it is the location of where Mr. Swenson observed the gray van near Eighth and St. Clair in relation to the 300 block of Michigan where the van was found?

A Four or five blocks.

ATTORNEY HABERMAN: I don't have anything else then, Judge.

THE COURT: Anything else on that?

ATTORNEY WINGROVE: No. Thank you.

THE COURT: Thank you, sir.

ATTORNEY HABERMAN: Your Honor, for the record I move for the admission of Exhibit 1A, 2, and 3.

THE COURT: Any objection?

ATTORNEY WINGROVE: I just ask the record reflect the previous objections I made, especially to the portions of the blood draw filled out by the hospital employee.

THE COURT: So noted. But they're received. Anything else, Mr. Haberman?

ATTORNEY HABERMAN: No evidence, Your Honor.

ATTORNEY WINGROVE: Just argument, Your Honor.

THE COURT: All right. Mr. Haberman, go ahead please.

[44] ATTORNEY HABERMAN: Thank you, Your Honor. I outline the gist of my argument in my brief to the Court dated October 14th. This is a blood draw pursuant to the implied consent law under 343.305. It is lawful pursuant to that. The fact that this was a blood draw done under the implied consent law means that this was a lawful blood draw and the evidence is lawfully obtained.

Missouri v. McNeely has absolutely nothing to do with this case. In the implied consent law under subsection 343.305(3)(b), a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent. So we have the status of the law as presuming someone has given consent. And just because their state becomes unconscious or not capable of withdrawing consent doesn't change the fact that they have agreed to have their blood drawn as part of Wisconsin law. Therefore, a blood draw once a person is unconscious pursuant to the implied consent law is still lawful.

We do need to look at a couple decisions to interpret unconscious operator as well as otherwise not capable of withdrawing consent. And that is generally *State v. Disch*, 129 Wis.2d 255 [sic] as referenced in my brief. It is in that case that the phrase unconscious is defined as (as read) "a person who is insensible, incapable of responding to sensory stimuli, or in a state lacking **[45]** conscious awareness." That is from page 234.

That is what we had here. That meets the definition as described by Officer Jaeger of the defendant's state. He would further, I guess, could be characterized as otherwise not being able -- otherwise not capable of withdrawing consent, but I think it's

more accurate to describe him as unconscious under the definition provided under *Disch*. Although the otherwise is described as (as read) "a person who has conscious awareness and can respond to sensory stimuli but lacks present knowledge or perception of his or her acts or surroundings." There was a discussion in *Disch* about that as well as *Hagaman*, H-A-G-A-M-A-N, which is referenced in my brief.

The bottom line is in this case the defendant was unconscious. It should be noted that in *Disch* the Court -- the Wisconsin Supreme Court said that the officer does not have to provide the information in an Informing the Accused form to a person who is unconscious 'cuz it doesn't serve any means at that point. The officer did do that though here, and that is, I guess, certainly to his credit as he was doing his best to comply with the complied consent law.

Once there was no response the officer could lawfully conduct a blood draw and, in fact, follow the standard procedures that the Court and everyone is familiar with regarding an OWI investigation. There was a blood draw **[46]** pursuant to the blood draw paperwork that is typically used, and the blood draw procedure was followed.

There's nothing to suggest this was a forced blood draw. There is nothing to suggest that this is a blood draw on a exigent circumstances situation when there has been a concern for exigency. This is not that case. It's not *McNeely*. It's not *Schmerber*. And it's not *Bohling* in Wisconsin.

Based upon the status of the defendant at the time this was a lawful blood draw. There's nothing about this blood draw that has suggested it was through some other hospital means or hospital record

obtaining means. Any such argument I think is merely speculation by the defense.

And on a side note, I would object to the argument about this. I don't think it's properly before the Court. I think the argument about this administrative code in DHS and confidentiality, once the defense filed their brief and cited *McNeely* as their authority to suppress this evidence, I don't think that this issue's appropriately before the Court.

If Attorney Wingrove was, I think, sincere about saying this is really where the issue is, then that should have been included as his authority in his brief, and it should have been articulated in advance to the Court rather than walking into the motion hearing and saying, here's some Administrative Code printouts from Westlaw, and here is my [47] argument. So I think that that issue is inappropriately before the Court.

That being said, it's a separate concept and distinct from this lawful way of obtaining blood evidence which is done in this case pursuant to the implied consent law.

THE COURT: Thank you. Mr. Wingrove

ATTORNEY WINGROVE: Thank you. I guess to respond to the last argument first, I did tell the State and the Court I was going to proceed down this path when I first appeared. I received the State's position 48 hours ago, and that precluded me from -- you know, this is the next step. I'm going to file this. I look for them to argue implied consent. Then I'm going to go down this path. It's a logical progress there. If it needs to be briefed, great, it needs to be briefed. If the Court wants me to file a motion on it, I can do that. I can get the transcript from today. I can

use that as my evidence.

With that said, we have a warrantless blood draw. They could have got the warrant. They didn't. There were no exigent circumstances. They're arguing implied consent. Okay.

Two basic problems with implied consent as I see it. The first and most significant one is if a police officer's confronted by someone who is gradually losing consciousness, **[48]** why not give him the Informing the Accused when he asks him to do the field sobriety. That way the issue's out there. That way you get it taken care of. The officer clearly knows this guy is deteriorating and going down in front of him. Somewhere along the line he should have, could have, should have done that. It would have been proper, would have been appropriate.

I'm also a little bit concerned on the implied consent on the blood draw because apparently there was, like, a 35-minute delay between reading the Informing the Accused and having the blood draw occur.

And I'm sorry, I need to digress for a moment. The implied consent cases the State relies upon talk about a situation where the officer comes upon an unconscious person. That's not this case. In this case the officer is talking to the person. The officer is asking him questions, asking him to perform field sobriety tests. So that distinguishes those cases and gives this case a different posture.

The last thing that we have is the blood draw that was made. The blood draw was made by a hospital employee. It's a facility that receives people under 51.15 and 51.45. That my client was obviously a patient at the time 'cuz he was receiving treatment.

Any identifying information from the hospital as a treatment record, that would include his name on the blood vial, and they're all subject to federal [49] confidentiality laws under 92 -- DHS 92, and there is a procedure for the disclosure of that information. And that's set under 42 CFR part two, 2.65. And I've given the Court a copy of that. That procedure wasn't followed. There's another procedure for investigations, but that can't be used in a criminal prosecution.

And finally, if that information is disclosed -- and this is on the last page of the information I've given the Court -- it's a crime to disclose or redisclose that information.

And that information has been disclosed. It has been redisclosed. And frankly, if the State -- I don't think intentionally or maliciously -- but is doing things that are criminal, that's a violation of my client's rights under the Eighth and Fourteenth Amendment to the U.S. Constitution. And the results from that test should be suppressed.

So for all those reasons we would ask that the warrantless blood draw be suppressed 'cuz in the alternative, what they could have done, what they should have done is applied for the warrant and avoided all this other issues that come up on a -- what ends up being a direct admit to a mental health treatment facility. And the testimony was clear. He passed through the ICU to 1-K.

So for all those reasons we ask the evidence from the blood draw be suppressed. And I would note in making [50] that request that's not going to prevent the State from going forward with this case.

THE COURT: All right. Thank you. Well,

regarding the warrantless blood draw, I think the State is correct in their position. And I read the *Disch* case after I got Mr. Haberman's brief. And I find that it gave ample support for the State's position that no warrant was required because Mr. Mitchell was unconscious.

The officer's testimony was that he took Mr. Mitchell after the arrest to the Police Department. Mr. Mitchell was -- it sounded to me like he was kind of with it initially, but he was deteriorating. And they get to the police station, and they're not sure that he can submit to a breath sample. So they take him to the hospital. And on the way to the hospital, he deteriorates to the point where he cannot be shaken awake. To me that's unconscious.

And the law -- when I refer to the law I'm referring to 343.305(3) (b) -- makes clear that an unconscious operator has -- cannot withdraw their consent to a blood sample. The only issue really regarding the warrantless draw is whether or not there is probable cause. That's the threshold question to whether or not you can do the blood sample.

And I find there is probable cause. I think the way the whole investigation went down -- I'm not being critical of anyone because the officer's just following his leads, and **[51]** there's really no one other than Mr. Swenson who saw Mr. Mitchell driving. And so there may be proof problems for the State in the long run. But as far as probable cause, I don't have a problem with finding probable cause.

Mr. Swenson said that Mr. Mitchell was drinking. He got into a car. That's what he advised the officer. The officer had contact with Mr. Mitchell's mother to help identify the vehicle. Eventually he finds Mr.

Mitchell within the hour, and Mr. Mitchell is very drunk. And he made the comment that he was -- I can't recall precisely what it was, but it was to the effect that he was too drunk to drive. I don't have a problem with probable cause.

Now, as far as the other issue that came up today, I'll entertain it. I agree with Mr. Haberman that notice was faulty. But I feel comfortable proceeding.

And I'm looking at the section that Mr. Wingrove provided to me. That's 42 CFR Chapter 1, Section 2.3(a), and that's Purpose. I'll read what it says. (As read) "Under the statutory provisions quoted in Sections 2.1 and 2.2, these regulations impose restrictions upon the disclosure and use of alcohol and drug abuse patient records which are maintained in connection with the performance of any federally assisted alcohol and drug abuse program."

There's no allegation that what happened was part of a drug abuse program. This is a simple OWI -- don't [52] interrupt me. I know you want to interrupt me, Mr. Wingrove, but don't.

This is a simple OWI investigation. Nothing more, nothing less. And the officer takes Mr. Mitchell to the hospital as they routinely do on OWI investigations. I don't care if they do Chapter 51.45's at Memorial. It doesn't matter. He takes him there.

They go through the regular procedure. Blood is drawn. And what I think is key is that the phlebotomist then gives the blood back to the officer. That's not part of any treatment program. And the officer does with it what he does. And that's his end with Mr. Mitchell.

At this point if Mr. Mitchell goes from the ER to

ICU to 1-K, that's another matter, but that's just a distraction. It's got nothing to do with this case. If the State did try to get information from the hospital regarding Mr. Mitchell after he had been admitted to 1-K, I think there would be a problem. But that's not what's going on. This is just a simple OWI investigation. Nothing more, nothing less.

So for those reasons I'm denying the motion.

Anything else?

ATTORNEY WINGROVE: I understand the Court's ruling. I would just direct the Court's attention to DH 92 which says that certain facilities that federal rules become applicable to, and that was -- at that time he was receiving **[53]** treatment at the time the blood draw was made. I agree it was separate from, and I understand that.

THE COURT: I think what you're doing, Mr. Wingrove, is just creating a huge distraction. It's a simple OWI investigation. That's it. He's getting no more treatment than any other person who's taken to the hospital for a blood draw when they're drinking and driving. That's it.

All right. Thank you. Do we have a trial date?

ATTORNEY HABERMAN: I'm looking. I don't see that we have a current trial date.

THE COURT: Let's set a trial date for December 17th. December 2nd at four o'clock we had another hearing with Mr. Wingrove. We can put Mr. Mitchell down at that time for motions in limine. Anything else?

ATTORNEY HABERMAN: No. Thank you.

ATTORNEY WINGROVE: Not today.

THE COURT: All right. Thank you.

***** (End of proceedings.) *****

State of Wisconsin
Circuit Court
Sheboygan County

State of Wisconsin,
Plaintiff,

v.

Gerald P. Mitchell,
Defendant.

Case No. 13 CF 365

Before the Honorable Terence T. Bourke
December 17, 2013

Transcript of Proceedings [EXCERPT]

* * *

[87] And Mr. Haberman, whenever you are ready you can

call your first witness.

ATTORNEY HABERMAN: Thank you, Your Honor.

The State will call Alvin Swenson.

THE COURT: If there's ever a break between witnesses and you want to stand up and stretch, that's okay. Especially in the afternoon it starts to carry on quite a

bit, so feel free to do so.

Mr. Swenson, before you sit down if you would please raise your right hand to be sworn in.

**** ALVIN SWENSON, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and

spell your last name.

THE WITNESS: My name's Alvin Swenson,

S-W-E-N-S-O-N.

THE COURT: Go ahead please.

[88] ATTORNEY HABERMAN: Thank you.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Swenson, how old are you?

A I am 44, sir.

Q And are you currently employed?

A Part-time.

Q What do you do part-time?

A Construction.

Q What type of construction?

A Roofing, siding, windows, painting.

Q And where do you live?

A I live at 922 North 11th Street, Sheboygan, Wisconsin.

Q And how long have you been there for?

A Six months.

Q Mr. Swenson, have you ever consumed alcohol before?

A I have.

Q Have you ever been intoxicated before?

A I have.

Q Have you observed other people who had been consuming alcohol and become intoxicated?

A I have.

Q Tell me about some of those observations you've made to form that conclusion that someone's **[89]** intoxicated? What do you see about 'em?

A Slurred speech, stumbling, fumbling around, you know, motor skills.

Q Any formal type training to see someone who's intoxicated?

A Just experience with it myself.

Q Okay. So during the month of May 2013 had you been living at that North 11th Street address or no?

A No.

Q Where were you living in May of this year?

A I was living on North Eighth Street.

Q Is that at 1127 North Eighth Street?

A It is.

Q And that's in the city of Sheboygan, Sheboygan County, Wisconsin.

A It is.

Q Do you know a person named Gerald Mitchell?

A I do.

Q Do you see him in court today?

A Yes, sir.

Q Can you describe him for the jury by what he's wearing and where he's seated?

A He's wearing a dark-colored suit with a white hat in the defendant's chair.

ATTORNEY WINGROVE: For today's purposes we'd **[90]** stipulate that the witness has identified Gerald Mitchell.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q On May 30th were you living at that North Eighth Street address?

A I was.

Q Do you know where the defendant was residing around that time?

A He was in transit moving from that residence to a new apartment he had just acquired.

Q And do you know what street that was on?

A I want to say St. Clair.

Q Why don't I ask it a different way. Where in relation to your apartment is he residing?

A Directly behind the apartment I was residing in.

Q Okay. But that would have been on St. Clair you think.

A Right.

Q Can you see that residence from your apartment?

A Yes.

Q Tell me about that. What's your -- what are you able to see?

A The back, the side and the back of the apartment he moved in, the backyard, the whole parking lot. There's a couple businesses right around the area **[91]** so kind of all share a parking lot.

Q Is it -- is this one of these apartment buildings that has the typical paved parking lot, or is there something --

A It's kind of separated. The back of the apartment that I lived in was paved, and there's a alleyway that goes through that, separates would have been his apartment to my apartment. And then where he resided it was kind of like gravel, grass, dirt, mixture of things. It wasn't paved.

Q Okay. And what, if any, information or contact did you have about the defendant on May 30th?

A There was a phone call that come in to the apartment, and I was the only person there at the time, so I had answered the telephone 'cuz I was also waiting for a phone call. And it was a woman on the phone asking to speak to one of the other roommates that had also lived in the apartment.

And I had informed her that, in fact, he was not at home at the time.

Q And you said you were waiting for a phone call. What kind of phone call were you waiting for?

A I was waiting for a phone call from my wife.

Q And why were you waiting for that phone call?

A We were going to dinner.

[92] Q Okay. So when you answered the phone, what, if anything, did you learn?

A I learned that there was a frantic woman on the other end of the phone, very scared person looking for her brother.

Q And how could you tell that she was frantic and scared?

A Just by her voice. I mean, you can hear.

Q What did she tell you about what she was looking for or what was going on?

A She wanted somebody to go check on her brother.

Q What did she say was wrong with her brother?

A She said that he had made a phone call to another family member and had made some allegations that he was possibly thinking about maybe hurting himself.

Q Like suicide?

A Exactly.

Q So when you spoke to this woman on the phone, what, if anything, did you do?

A I was really reluctant to even get involved 'cuz I really didn't know the person well, maybe a day or so interactions. But just the tone of her voice and I mean, she was pleading at that time pretty much for somebody to go check on her brother. And I did. I left the apartment and had went back to **[93]** his apartment, opened the downstairs door, and yelled his name several times.

Q And let me stop you there. You indicated that you were reluctant to get involved because you had only really known this person for a day or so. When you're saying that, who are you talking about?

A The defendant.

Q Okay. So just to be clear, had you been friends with the defendant before this?

A No, sir.

Q Enemies?

A No, sir.

Q So you go to his apartment, and are you going to the front or the back of the place or the sides?

A Actually the only entrance I know to get in would be the back of the apartment.

Q And is that in the same location as where the parking lot, the gravel parking lot is?

A It is.

Q And you yelled for his name. Tell me what happened.

A I yelled for his name several times. I could hear him upstairs. It appeared to me that he was upset about something. I thought for a minute that maybe somebody was up there with him 'cuz there

was some [94] shouting, yelling. I had his sister on the phone, and I did ask her if she knew if there was -- if there was anybody with him.

Q So you -- are you still on the phone with this person as you walk to --

A Correct.

Q Okay. And how do you know that it's him that's yelling upstairs? At this point had you seen the defendant?

A No, I didn't know.

Q Okay.

A I had no idea who it was.

Q All right. So what happens next?

A I raise my voice, I guess, quite a bit louder and yelled his name two, three, maybe four times more. And then I had actually visually seen him up at the top of the stairs.

Q Tell me what you observed.

A He was, I guess, highly agitated about something. Something I could tell was definitely wrong at that point. He wasn't happy. And when he seen me down at the bottom of the stairs, it made him less happy.

Q What do you mean by that?

A Well, he got verbal, got loud.

[95] Q Did he yell at you?

A Couple times.

Q Did you notice anything about his mannerisms or his demeanor?

A Just that he was at that time that he was highly agitated about something.

Q At this point had you smelled anything?

A I did when I first walked into the back door. I didn't walk into the back door all the way 'cuz I didn't know what I was walking into really. So I just kind of stepped in halfway. And you could smell a very strong odor alcohol.

Q And do you have any reservations that that was the odor that you smelled, that it was alcohol?

A Oh, it was definitely alcohol.

Q How strong? Can you quantify it at all?

A On a scale between one and ten, five, six maybe.

Q Okay.

A I was on a downstairs landing. The door was open. I really didn't know where it was coming from, garbage, another neighbor, you know. I didn't know.

Q Okay. Did you see anyone else around the area at this point?

A No.

[96] Q What happens when the defendant steps out of his door? What happens next?

A I had asked him if he was okay. And during the process with him yelling at me, his sister's also trying to ask me questions on the phone. So I'm trying to hold two conversations, reassure her that, in fact, he is okay, he's standing in front of me. I do have visual contact with him, and he is speaking to me. I informed him that I was on the phone with his sister, and that's probably what I shouldn't have did because

it highly agitated him at that time, and he had started coming down the stairs towards me.

Q Tell me what happens next.

A I had backed out of the apartment. I had removed myself completely from his property. Our property is so close, it's probably ten feet, and I'm back onto property of the apartment that I was living in. And that's what I did.

Q Were you still standing outside at this time?

A I was.

Q And then what did you observe?

A I observed the defendant. He come downstairs all the way, and he looked like he was alive and well. I informed his sister I was gonna also -- I was **[97]** gonna try and contact one of the other roommates 'cuz he was very much more familiar with Jerry than myself. And I didn't know if this was something that has reoccurred in the past or if it was something new and somebody knew how to deal with this situation 'cuz I sure didn't. And I didn't want to deal with the situation. I had, you know, other things to do.

Q What, if anything, did you see the defendant do next?

A Shortly afterwards I had taken myself out of the whole back of the parking lot and moved in between the buildings and went around, and I had made a phone call to a roommate by the name of Javier Yera and explained to him about the phone call that I received, if there was anything that he could do. If he was in the location maybe he can come and contact Jerry, try to figure out what was going on, if there was anything that somebody could do to,

you know, help him or whatever that he needed at the time.

Q And when did this contact with Javier happen in relation to the original phone call you got?

A In minute wise?

Q Sure, yeah.

[98] A Probably maybe four to six minutes.

Q Okay. Do you remember when you got the initial phone call?

A The exact time? I guess it was -- my wife was to call me somewhere between three and 3:30, and it was probably just shortly before three o'clock.

Q Okay.

A Very shortly before three o'clock because I did think that was her that was calling.

Q Do you remember a specific time at all?

A Between I'd say 2:50, 2:55, roughly right in that general ballpark.

Q Okay. And after you had this phone conversation with Javier, what happens next?

A Javier told me he was going to make another -- he was going to call somebody that was familiar with Jerry and contact me back, call me back. And asked me if my wife called to come pick me up to just wait to try to keep an eye on Jerry to make sure he was going to remain okay.

The apartment I lived in was on a second level. In the back of the apartment there is kind of like a little balcony, patio kind of thing. And the requirements of that property is you can't smoke inside the buildings.

And I'm a smoker, so **[99]** I stepped out on the little balcony to smoke a cigarette and wait for the returning phone call.

Q And what happens, if anything, while you're out there?

A Well, I got the phone call from Javier, and I was actually on the phone with him at the time, and he had told me to stay there. He had already contacted the Police Department, and they were coming to make contact with me.

And as I'm talking to Javier on the phone, Jerry walks out his back door carrying what I think is garbage in a bag. He walks across the parking lot kind of that he lived in is kind of long. He walked the side of his van to the garbage area and put the bag down, and then headed back towards his apartment, which I was kind of hoping that's where he was going to go.

Q Let me stop you there. Why were you hoping that's where he was going to go?

A Well, 'cuz I was just informed that the police were coming to contact me. And once again I'll say it, I did not want to get involved in this whatsoever. This was none of my business. You know, I was a new roommate there, wasn't familiar with the person, you know. Got a phone call, and this is **[100]** telling me somebody's going to commit suicide. It kind of scary thing, you know.

Q So you're watching Jerry put this garbage bag down. And what happens next?

A He walks back in the direction of his apartment. And like I say, I was hoping that's where he was going. And he approached the side of a

minivan and got in it. And kind of when I really got worried 'cuz he drove off. He started the vehicle, got in the vehicle, and drove off.

Q And describe this minivan that you saw.

A Grayer, a gray color minivan. I really can't describe -- I mean, minivans are minivans besides the color of it. I don't know what kind of make or model it was.

Q Did you watch Jerry get in the driver's seat?

A I did.

Q Did you see anyone else outside with him in the vehicle or near the vehicle?

A No, sir.

Q And what, if any, observations did you make about whether or not he was intoxicated?

A When he come down the stairs and he was, you know, screaming 'cuz he got really agitated that I was there, and like I say, on the phone with his [101] sister. At that point in time I don't think he wanted anybody to get involved in none of this.

And I'm a drinker, you know. I've drank for a number of years, so I know that you get some alcohol in you, you get the speech slurred. It's usually the first thing I notice where I realize maybe I've drank one too many. Might be time to stop.

And like I say, some motor functions you can tell. Like, walking, stumbling a little bit. He looked like, appeared to me -- but I'm not no expert -- that he might have been drinking some.

Q Any particular level of intoxication that you were able to observe?

A I guess by the interactions that I already had with him over the last day or so to that interaction and the way his speech was, he was pretty lit.

Q And did you notice him stumble at all?

A Once again, I'll say the parking lot's not blacktop or concrete or not. It's kind of gravel and grassy area. So I can't say whether it was caused by the ground or whether it was because he was drinking. But it wasn't a straight walk if that's what you're asking.

Q Okay. So you watched him walk, and you could tell **[102]** that he wasn't walking in a straight line, but you can't say whether or not that he was drunk and that was his walking pattern, or it was because he stepped on something in the parking lot.

A Correct.

Q Did he -- it sounds like your testimony is that he didn't walk in a straight line. Did he stumble? Did he trip or did he fall?

ATTORNEY WINGROVE: Objection. Asked and answered.

THE COURT: Overruled.

BY ATTORNEY HABERMAN:

Q You can go ahead and answer.

A No, he didn't fall. No. I mean, but it looked like he might have been having some difficulties walking across that parking lot.

Q Okay.

A Like I say, the parking lot's uneven. And I don't know what the reason was or why, you know, he was walking that way.

Q Do you know the approximate time that he got into the car?

A It had to have been somewhere probably maybe five to ten after three.

Q How is it that you are so certain or able to give **[103]** us kind of a five-minute window?

A 'Cuz I was waiting for a phone call from my wife, and I do have a cell phone, and I was on the cell phone with Javier when Jerry got in the vehicle. That's the first thing I said is, oh my God, Javier, he's getting in his vehicle, and he's going to drive off. Somebody's got to get here.

Q Why is that such a big deal to you?

A Because I'll say it again, this is not something I wanted to get involved in. I had prior plans with my wife, you know. That's how I wanted to spend my evening is with my wife and kids.

Q What were your concerns when he got in that vehicle?

A Well, unfortunately accidents happen, and if he was under the influence of alcohol at the time, public safety, you know. I got wife and kids in this community, you know, friends and family.

Q Had you seen this gray van before?

A I did see the gray van before. I knew it was his. But that was the last time I seen the van.

Q Okay. Had you seen that van in that parking lot before?

A I did see it parked in that parking lot for probably about a day-and-a-half, two-day period of **[104]** time.

Q When you were making these observations on May 30th around three o'clock and shortly thereafter, had you been drinking at all?

A No.

Q You indicated that you have drank in the past. Are you certain you weren't drinking at all?

A I am a hundred percent positive.

Q What about doing any sort of drugs?

A Absolutely not.

Q As part of -- once you observe the defendant get in the van and drive away, are you able to see where he goes?

A No.

Q And what happens next?

A Javier informed me once again that the Police Department was already contacted, and I was the contact person that they were coming to talk to and to do not leave the apartment. Or he asked me not to -- to just to wait 'cuz he already knew I had prior arrangements with my wife also 'cuz he tried to make plans with me for that evening to go work out at the YMCA, and I told him I couldn't.

Q Did you speak to the police then?

A I did.

[105] Q And about how long after you made your observations did the police come?

A Probably maybe 15 minutes at the most. First it was one officer, then another officer had pulled up. I had went out on -- I had went out on Eighth Street

out to the front of the apartment and just waited for 'em.

Q And did you provide a description of what you observed to the police?

A I did.

Q And did you make a written statement to the police?

A I did.

Q Mr. Swenson, you had explained as part of your initial contact, maybe the first moment you saw the defendant at the top of the stairs, you made a comment or in your testimony that he was alive and well. What -- can you clarify what you mean by that?

A Well, 'cuz his sister had informed me that Jerry had contacted his mother shortly before and told his mother that he was -- apparently some things had happened recently in his life that was uncontrollable for him, that he had no control over, and he was distraught about it. And he was sick and tired of life kicking him in the teeth, so **[106]** to speak, and he was done, and he was going to commit suicide. His sister informed me that they had tried to contact him several times, and he was not answering his cell phone.

Q So just to be clear, do I understand that your comment about alive and well is not in reference to his state of intoxication but in reference to whether or not he's still alive and not -- he hasn't already committed suicide.

A Exactly. His sister was very concerned about whether he was really going to do harm to himself or not.

Q Did you ever see him with any alcoholic beverages?

A No.

Q Did you see him get into that van with anything in his hand?

A He did not have nothing in his hand when he got --

Q Are you certain?

A I am a hundred percent positive.

Q And from your viewpoint you talked about kind of the property distance. You said, you know, if you step ten feet you'd go onto your property versus his property. What kind of distance are you making your observation from this porch down to this parking lot area where he gets in his car?

[107] A Fifty feet.

Q Okay. Anything obstructing your view?

A No.

Q Any trees in the way?

A No.

Q May 30th, 3 p.m., light out? Was it light out?

A Middle of the summer. Very light out.

Q Okay.

A Very bright.

Q Mr. Swenson, have you been convicted of crimes before?

A I have.

Q And how many times?

A I believe approximately 12.

Q Okay.

ATTORNEY HABERMAN: Nothing further then.

THE COURT: Cross-exam?

ATTORNEY WINGROVE: Thank you.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q Just for clarification, Mr. Swenson, that's 12 convictions within the past ten years, correct?

A Yes, sir.

Q Okay. You're currently on probation, correct?

A I am.

[108] Q You're currently in custody at the Sheboygan County Detention Center?

A I am.

Q And the prospects of your future really are in large part at the discretion of your agent, correct?

A It is.

Q Now, when the officer arrived you made a statement to him, right? He asked you what's going on?

A I did.

Q And the officer says that you told him, he shouted out the window to Gerald asking him what was wrong, and Gerald made a vague statement about ending his life because of ongoing difficulties. That sound correct to you?

A It does.

Q Okay. Now today you're saying that you were downstairs at Gerald's apartment and he was upstairs, correct?

A I was at the bottom level of his apartment.

Q Okay. What exactly do you mean by that?

A Well, there's a -- like I say, the only way I know to get into Jerry's apartment is a back door.

Q Okay.

A And I do know there's – it's access to another **[109]** apartment. You walk through the door. You immediately take a right, and there's a set of stairs you go up. There's a door, and you go to Jerry's apartment.

Q Okay. So there's a door. You walk in it. You take a hard right. You walk up a flight of stairs. How many stairs?

A I couldn't tell you. I didn't go up the stairs.

Q Anything unusual about 'em? It's just stairs to a second story in a Sheboygan apartment house?

A Yeah.

Q So --

A Pretty typical two-level apartment.

Q Okay. And there's a door at the top; is that right?

A Yes there is.

Q And you saw him at the top of the stairs?

A Not when I first entered and yelled his name. The door was open, but when I yelled his name, I could hear him up there.

Q Okay. How far away was that?

A From the top of the stairs to where I was at?

Q Please.

A I don't know. However many steps there are.

Q Sure. Fair to say it's a ways.

[110] A Probably 15, 20, maybe 25 feet. I'm not sure. I don't know.

Q Okay. And you said you first smelled alcohol when you first walked into the back door.

A Correct.

Q Okay. And you also said you didn't know where it was coming from, right?

A Correct.

Q Okay. Might it have been coming from the trash?

A Well, the trash is actually outside and probably 20 to 30 feet behind the house.

Q I'm sorry. I thought under direct you said you didn't know where it was coming from. It could have been coming from the trash?

A Oh it could have been 'cuz there's a neighbor down there.

Q So fair to say it might have been that.

A It could have been.

Q Okay. So you're down the stairs. Jerry's up the stairs. And when the cops first got there, you didn't think to tell them about any of this, did you?

A About . . .

Q The fact that it was -- well, initially what you told the cop was you shouted out the window to ask [111] Jerry what was going on, and he made vague statements about ending his life. And now --

A I didn't make that statement to no police officer.

Q Okay.

A Maybe off the balcony at one time 'cuz I do believe I had said something to Jerry when he was getting in the vehicle.

Q Okay. So if the officer testifies that his report says he shouted out the window --

ATTORNEY HABERMAN: Judge, I'm going to object. He's already answered any question's going to come from this, and that's he didn't tell the officer that. That was already in the question of Attorney Wingrove.

THE COURT: I thought the first question was phrased in a way that was difficult to understand. I don't mind if Mr. Wingrove rephrases the question in the context of what's in the officer's report. I think that would be more solid than the way the question was originally phrased.

BY ATTORNEY WINGROVE:

Q What the officer's report says is that you told him -- it says he, but that's referring to you. (As read) "He shouted out the window to Gerald asking him

what was wrong, and Gerald made a vague statement about ending his life because of ongoing difficulties."

[112] A I don't understand where the officer would make a statement about shouting out the window. No window was even in the whole scenario.

Q And it's fair to say you didn't really want to get involved in this, did you?

A I'll say it still till today.

Q Directing your attention to December 3, 2013, did you talk to anybody about this case?

A December 3rd?

Q December 3, 2013. Do youremember someone named Jamie Schnell?

A Oh, I do. Private investigator that you had contact me.

Q Sure. And you told her you didn't want to get involved, right?

A I'll say it still till today.

Q And initially you had no idea you were a witness in anything, did you?

A I had no clue.

Q And initially when she asked you about Gerald Mitchell, you didn't know what she was talking about, did you?

A I did not know him by that name, by Gerald.

Q Sure.

A And I did not actually know what his last name was **[113]** till

Q Okay.

A -- recently.

Q I'm sorry. Go ahead.

A I did not know what his last name was till recently.

Q Sure. And it's fair to say you told the PI you were trying to avoid process, right?

A I did.

Q And when I say trying to avoid process in other word to say that you were ducking subpoena?

A I did.

Q So according to the story, you had this interaction with Gerald Mitchell. You decide to go smoke a cigarette. You're up in the balcony 50 feet away from the van, right?

A Correct.

Q Jerry comes out the back door, right?

A Correct.

Q And you're testifying today -- well, where was the van parked in relation to the back door?

A The back door of whose apartment?

Q The back door of Jerry's apartment.

A Five feet.

Q Okay.

[114] A Five feet from the back of his -- his apartment sits right here (indicating). Our apartment sat right here (indicating). Directly right next to each other.

Q I have a copy of a aerial photograph prepared by the State. And there's some red boxes on it.

A Correct. I see 'em.

Q And this one red box is marked 1125.

A I see it.

THE COURT: There's a reference, ladies and gentlemen, to this photo. Does anybody have a difficult time seeing it? If you do make sure you let me know please.

And Mr. Wingrove, if you're going to refer to that, there's an easel over here with some clips on it that might be of assistance. It should probably be marked as an exhibit.

BY ATTORNEY WINGROVE:

Q Before we mark this as an exhibit, I want to talk about what it is for a minute, okay.

A Okay.

Q And you're familiar with the area of Eighth and St. Clair in Sheboygan, Wisconsin; is that right?

A I am, sir.

Q You've lived there, right?

A I have.

[115] Q And in fact, this building marked 1125, is that where you were living?

A It is.

Q And there's this building marked 723. Is that where -¬

A It is.

Q Okay.

THE COURT: You said is that and then he answered. The question should be completed 'cuz I don't know what that is.

ATTORNEY WINGROVE: Thank you, Judge.

BY ATTORNEY WINGROVE:

Q There's a building in a red square marked 723. And is that where Gerald Mitchell resided?

A Yes it is.

Q Okay.

ATTORNEY WINGROVE: I'm not sure what's going to please the Court, but I want to have him identify --

THE WITNESS: Where I was at?

BY ATTORNEY WINGROVE:

Q Yeah. I'm going to take a orange highlighter, and if I could ask you to come down and just make a dot.

A (Complying.) There is a balcony that sits on the second floor. You can actually see the balcony.

[116] Q Just make a dot where the balcony was. There we go. Don't go away please. Please take this. And you saw Gerald Mitchell get into a van, correct?

A Yes I did.

Q Please just make a very small line where the front of the van was.

A (Complying.)

Q Just like that. Now let's take a red pen and mark where the front door was -- back door, I'm

sorry, the back door of 723, the door you saw Gerald Mitchell come out of.

A (Complying.)

Q Now please take this blue pen and draw in where the body of the van was.

A (Complying.)

Q Thank you.

ATTORNEY WINGROVE: At this point I would ask this be marked as Exhibit 1 and received.

THE COURT: Corrie has the sticker, Mr. Wingrove. If you would want to take the sticker and put it on. Thank you.

BY ATTORNEY WINGROVE:

Q So Mr. Mitchell walked from the back door to his van, correct?

A No. He walked from the back door to -- there's [117] another vehicle you can see in the square of where Mr. Mitchell's van is. There's a -- what appears to me a white vehicle parked there. That is approximately the same location as where they put their trash. It would be in the lower left-hand corner of the square box.

Q So you saw him walk out there. And how long did it take him?

A I don't know. A minute or two. He was carrying what appeared --- what I thought was trash.

Q Sure. And what did he do with the trash?

A He had put it into the trash.

Q And what did he do next?

A He turned around and headed back towards the direction of his apartment.

Q Okay. And what happened next?

A He got in his van.

Q Which side?

A The driver's side.

Q Okay. And you know if there was anything in the van? Did you look in the van earlier that day?

A No.

Q Okay. When you were down allegedly going into Mr. Mitchell's apartment, you didn't look in the van then either, huh?

[118] A No.

Q Now, so you were at the balcony when he stepped out the back door with the trash smoking a cigarette, right?

A I am on the balcony smoking a cigarette, right.

Q Okay.

A I am actually on the phone with Javier at that time.

Q I'm looking -- you made a statement to the police on May 30th, correct?

A If that was the day of the incident.

Q Yeah. So let's back up for a second. You're absolutely sure you're on the balcony when you saw him come out the back door, right?

A I am.

THE COURT: Mr. Swenson, are you able to see Mr. Wingrove with the easel placed as it is?

THE WITNESS: Kind of. I can hear him fine.

THE COURT: It's probably easier for communication if there's eye contact also. If you could move the easel, Mr. Wingrove.

ATTORNEY WINGROVE: Permission to approach the witness?

THE COURT: Yes, sir.

[119] BY ATTORNEY WINGROVE:

Q So you made a statement to the police on the day in question, correct?

A I did.

Q And just handed you a statement.

A The statement I had made.

Q Okay. At the time you made this statement was it true and accurate?

A To the best of my knowledge it was.

Q Okay. Now, I'm going down and I'm going to read part of the statement to you, okay? And I want you to follow along with me. (As read) "I asked him if he was okay. He told me to fuck off and live him alone. I asked him if he called his mom, and he told me to -- told me fuck this world, he was done. I at that time stepped out his back door and he also came out with a bag of trash."

A That's when I had -- when Jerry come down the stairs upon the first contact, I removed myself from his property, from his home, and put myself back onto the property that I belonged in.

Q "Jerry started to walk to the trash bin and he almost fell." You said that in your statement, right?

A I do believe I did.

[120] Q So on May 30th you tell the police you were talking to Jerry. He comes out the back door with a bag of trash. And today you testify you're up on the balcony smoking a cigarette when he comes out with the bag of trash.

A I was on the balcony. When Jerry got in his vehicle I was, in fact, on the balcony.

Q I'm talking about when he came out the back door with the bag of trash. You said two different things now.

A When he come out the back door and I was on the telephone with his sister, he had a bag in his hand. At that point in time I don't know if he set the bag down and focused on me and his sister. I was on the telephone with his sister. I removed myself immediately -- I told him -- I told the sister on the phone to contact somebody. I was waiting for prior arrangements. He was alive and well. I would contact one of the other roommates, let them know what was going on. And I was done with the situation.

I walked back around the building. On Exhibit A where it says Eighth Street where it says 1125, you can see there's a gap in between the buildings right there. I walked back around to the **[121]** front of our apartment and immediately went upstairs and went out back to smoke a cigarette.

I don't know if he had -- when I had seen him walk with the trash bag, it's possible he could have picked the trash bag up from by his door and walked it out to by where the other vehicle is and put it down and turned around and go get in his vehicle.

Q Okay. So now -- earlier you said you saw him come out the back door with the trash bag when you're on the balcony and put it in the trash. We all know you said that.

A Right.

Q Now you're saying he came out the back door with the trash bag, maybe he set the trash bag down. You went down the alley around to the front of the building back out to the balcony. How long did that take?

A A minute.

Q And when you're there with the officer initially when you made your first statement, you saw him come out the back door with the trash bag and he started to walk to the trash bin. That's what you said, right? That's what your statement says, right?

[122] ATTORNEY HABERMAN: Judge, I object. It's a compound question. He's asking two different questions.

THE COURT: Well, if --

ATTORNEY WINGROVE: Okay. I'll break it down.

BY ATTORNEY WINGROVE:

Q That's what your statement says, correct?

THE COURT: You know what he's referring to, Mr. Swenson?

THE WITNESS: No.

ATTORNEY WINGROVE: You want me to come up?

THE COURT: If you'd show him what you're referring to.

THE WITNESS: I have it right here.

THE COURT: He did find it.

ATTORNEY WINGROVE: Okay. Great.

THE COURT: You want the question repeated?

THE WITNESS: Yeah. Please.

BY ATTORNEY WINGROVE:

Q Your testimony earlier today was you saw him come out of the back door with the bag of trash. He had nothing in his hands. He walked and put it -- the bag of trash -- in the trash bin, and he walked to his van, right? You remember saying that a few minutes ago?

[123] A That he had nothing in his hands?

Q Yeah.

A I was asked by the district attorney if he had anything in his hands when he got in his vehicle. He did not.

Q Sure. Obviously he had something in his hands when he walked to the trash.

A Obviously that's a trash bag. That's different from walking to the vehicle and to the trash can.

Q Sure. Now, what you said is when he came out the back door and he may have set it down, and you walked around the alley to the front of the building and back up to the balcony?

A I can tell you when he knew I was on the phone with his sister, he was very pissed off at me and --

Q Could you answer the question please?

ATTORNEY HABERMAN: Judge, I think he is. If Mr. Wingrove would give him a moment.

THE COURT: Go ahead and finish your answer.

THE WITNESS: I didn't know at that point in time whether he was going to directly come at me in a physical manner, but I was immediately taking myself out of the situation. My back was turned by the time Jerry had probably got to the bottom stair, and I was hanging up on the phone with his sister because I no longer wanted to be **[124]** involved with this situation whatsoever.

This was none of my business. I didn't want to be involved, and I was removing myself from the situation. I don't know at that point in time if he set the bag down in the door, by the door and turned around 'cuz he yelled at me a couple times as I'm walking away. He apparently must turned around and went back to his -- the back door of his apartment.

BY ATTORNEY WINGROVE:

Q How do you know that?

A For whatever reason. Because when I went into the apartment and upstairs to the balcony and I had come out on the balcony and answered Javier's phone call, he was coming out again the back door of his house with the bag of trash in his hand going to the trash bin. There's a --

THE COURT: Why don't you wait for the question, sir?

And Mr. Wingrove, I want to break for lunch in the next few minutes. When you get to a break in

your cross, let me know, and we'll take a break at that time.

ATTORNEY WINGROVE: I would say we're at that point now.

THE COURT: Ladies and gentlemen, it's ten past 12. I want to start at quarter past one. Keep in mind **[125]** what I said earlier. You're not sequestered, so if you want to go leave and go home or run an errand, you can do it. Make sure you're back here please in the jury room at about ten minutes past one so we can start at 1:15. Thank you.

(The jury leaves the courtroom.)

THE COURT: It's about 12:10. The jury's out of the courtroom.

Mr. Swenson, you can step off the stand.

We'll take a break. Start again about quarter past one.

COURT CLERK: Are we not marking things today?

THE COURT: We'll mark it.

ATTORNEY WINGROVE: I was going to ask that be received and that be marked.

THE COURT: We'll mark it. Anything else to take up before we break?

ATTORNEY WINGROVE: No.

THE COURT: One thing I noticed is the date in Count 2 is wrong. It makes reference to him, meaning Mr. Mitchell, driving on June 26th. I think that's easily corrected. Is there any objection, Mr. Wingrove, if Count 2 is amended to reflect that the date of the offense was May 30th?

ATTORNEY WINGROVE: For the record I'll argue **[126]** they're stuck with whatever was said when the jury was impaneled. I understand the Court can rule otherwise.

THE COURT: I can always amend the Information to comport with the proof. All the evidence today is going to be about May 30th. So -- and I'm looking at the stipulation that you two presented to me, and it makes reference to May 30th being the date of the blood draw. So I'll make the amendment to Count 2 to reflect that that did occur on May 30th and not June 26th.

ATTORNEY WINGROVE: Thank you.

ATTORNEY HABERMAN: Judge, thank you. I apologize. I looked at that Information and tried to see if there were any problems with it. Sorry.

THE COURT: That's all right.

(Lunch recess.)

(The jury returns to the courtroom.)

THE COURT: The time is a quarter past one, and the jury's back in the courtroom.

And Mr. Swenson, you're still under oath. You won't be sworn in again.

And ladies and gentlemen, we'll take break in another couple hours. And as I mentioned before, if anybody wants to take a break between now and then, it's okay to raise your hand and tell me. And also if there's a break between witnesses, if you want to stand up and stretch that's **[127]** permitted too.

With that, Mr. Wingrove, you may continue.

BY ATTORNEY WINGROVE:

Q So let's go to you're upstairs on the balcony smoking a cigarette when Jerry takes the trash out?

A Yes.

Q Okay. I look to your statement and it says (as read), "Jerry started to walk to the trash bin and almost fell. I asked him if he was okay again, and he got very upset."

A Yes. I do believe at one point in time when I was upstairs I did say something to Jerry as he was walking. I don't exactly remember what it was.

Q And you would have been 40 or 50 feet away from him when you said that, right?

A Approximately, yeah.

Q As I read the officer's report, it says Alvin contacted police. Is that what happened?

A No. I contacted one of the other roommates. The other roommates contacted another third party which informed him to contact the police. When Javier called me back, he told me -- he did inform me that he did contact the police, and they were en route to contact me.

Q So you didn't contact the police. Do you think you **[128]** told the officer you did contact police?

A No, not at all. They already knew who the contact person was.

Q Now, you said your experience with knowing intoxicated people from watching other people who were intoxicated and your own intoxication, right?

A Correct.

Q Okay. Have you had any experience with medication issues?

A No.

Q Okay. Have you ever seen someone on psychotropic medication when their medications weren't adjusted properly?

A I don't understand --

Q Okay.

A -- what kind of medication you're asking about.

Q Okay. Thank you for the clarification. Some people when they suffer from emotional disorders, such as depression, they're put on medications. And sometimes those medications aren't properly administered to the person, or they have to change their dosage. Have you ever had experience dealing with anybody in those situations?

A Not to my knowledge. I don't know. I'm not a medical professional. I don't know. I could have [129] and not known it. I don't know.

Q So it's fair to say if that situation presented itself, you really wouldn't know what you were seeing, would you?

A Absolutely not.

Q And when you're done here today, you go back to the jail, right?

A Correct.

Q And then you learn what the DOC has in store for you.

A Correct.

ATTORNEY WINGROVE: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Swenson, let me talk to you a minute about the fact that you're on supervision. What, if anything, do your rules tell you about cooperating or testifying in court?

A My stipulations on my supervision rules are I have to cooperate with any courts, law enforcement agency a hundred percent.

Q Does that -- if your agent would find out or be informed that you were lying in any way, would that be considered cooperation?

[130] A Absolutely not.

Q Are you -- do you know if you would be in more trouble if you lie than if you wouldn't?

A I would be under jeopardy to be revocated.

Q If you tell the truth and if you do not lie, what, if anything, do you know about your future?

A I would not be breaking no rules of my supervision.

Q Okay. Attorney Wingrove was able to bring out Exhibit 1, which is this map. I'm going to bring this closer to you, Mr. Swenson. We're going to talk about it in a little better, maybe easier-to-use context.

ATTORNEY WINGROVE: If I may, Judge, I'm going to ask permission to come around so I can see.

THE COURT: You may.

BY ATTORNEY HABERMAN:

Q Can you see it?

A I can.

Q All right. Can you still see it?

A Yes, sir.

Q Mr. Swenson, come on up to the map and use your finger to point and hold it where you have indicated the porch is. And you drew that for Attorney Wingrove using that orange marker.

A The balcony would be approximately right there. **[131]** You can actually see the shadow of the porch right there.

Q Okay. Hold your finger there for just a moment.

A (Indicating.)

Q You're pointing to basically the middle of the red box in which the numbers 1125 are in the middle.

A Correct.

Q Okay. And just while we're on the map for a minute, point with your finger where the defendant's vehicle was parked.

A Right here (indicating).

Q And that's basically in the middle of the red box where 723 are the numbers inside of it.

A Correct.

Q And is there anything obstructing your view from seeing that vehicle?

A No.

Q From the porch.

A No.

Q And the front door is just -- point to the front door -- or the back door where you saw the defendant leave from I should say.

A It would be right directly in front of where the vehicle was parked, probably approximately five feet.

[132] Q And now -- and that's marked on the map already with a little red line.

A It is.

Q And point with your finger where the trash bags, where the trash pile was.

A You can actually see -- in the corner you can actually see trash cans. There's another vehicle at the rear end of the driveway. You can actually see where the trash bins are right here.

Q And your finger is in the lower left corner of the red box with the number 723 in the middle.

A Correct.

ATTORNEY WINGROVE: For the record I'm going to object. This is repetitive.

THE COURT: I agree.

ATTORNEY HABERMAN: I'm going to offer some clarification questions on it. I think they were foundationally necessary, but I'll move on, Judge.

THE COURT: Move on.

BY ATTORNEY HABERMAN:

Q You can have a seat, Mr. Swenson. If I understand your testimony correct earlier, you resided at 1127 North Eighth Street, right?

A Yes.

Q And what can you tell me about the building itself **[133]** you resided in? Is it just an apartment complex, or is it more to it?

A There's several businesses and actually a Christian community, like, a bible study hall, Christian community gathering. There's to my recollection a pizza parlor, a vacuum shop, the Christian community, and the apartment.

Q So do you know whether or not there are multiple address numbers for that particular building?

A There is definitely.

ATTORNEY WINGROVE: Objection. Relevancy.

ATTORNEY HABERMAN: Judge, that's why I'm going to clarify what the map is. So it's not irrelevant.

THE COURT: I think we're getting close to beating a dead horse to be honest. I think you ought to think about what you need to establish and get it done.

ATTORNEY HABERMAN: I'll move on, Judge.

BY ATTORNEY HABERMAN:

Q Mr. Swenson, when you described what you observed earlier on your testimony, Attorney Wingrove talked about a couple different, as he described it, kind of versions of your statements. When you were at the top of the stairs -- excuse me -- when you were at the bottom of the stairs looking up and you saw the defendant at the top of the stairs when you **[134]** first saw him, did he have a garbage bag in his hand?

A He did.

Q All right. The next point in time is when the defendant starts walking down the stairs. Are you inside or outside at that time?

A I'm half inside, half outside looking directly at him.

Q When he's walking down the stairs, do you know if he has the trash bag in his hand or not?

ATTORNEY WINGROVE: I'm going to renew the objection to repetitive.

ATTORNEY HABERMAN: Judge, Attorney Wingrove went on what he describes as inconsistencies, so I'm trying to establish what's consistent in his testimony.

THE COURT: Just go ahead.

THE WITNESS: When Jerry took the first step towards me coming down the stairs, he did have a bag in his hand. And I immediately removed myself from his property. I backed up out of the door.

And you can see where the property line splits. You can see on the picture there's a alley between the buildings. And I went to the other side because it was now on our property. I didn't know the gentleman. I didn't know if he was going to try to get physical or if he was just being **[135]** verbal because he didn't want me there. And he, in fact, knew I was on the phone with his sister. I made that clear.

BY ATTORNEY HABERMAN:

Q So the next point you're at roughly going into this alleyway area-ish.

A Right.

Q Do you know where Jerry was at that moment, the defendant was?

A Not exactly, no. Closer -- he appeared 'cuz I'm walking. I got my back to his residence. It would appear that he would probably be closer to coming out the door or maybe even already on the stairs coming out the door 'cuz I can hear him yelling at me.

Q Okay. So are you actually able to see him at this point?

A I had my back to him.

Q Okay. So do you know whether or not he had a trash bag with him at that moment?

A No.

Q When you next saw the defendant, I understand, is when you're on your porch making the observation?

A Correct.

Q And at that moment what are you seeing him doing?

A He's coming down the stairs. I couldn't tell you **[136]** how many stairs, maybe two, three stairs to his thing walking his trash to the trash can.

Q Are these the exterior stairs, not the interior ones you were talking about?

A Correct. It was already from his door frame to the ground level.

Q Okay. And -- Mr. Swenson, have you told the truth today?

A I have.

ATTORNEY HABERMAN: I have nothing further, Judge.

THE COURT: Anything new for recross?

ATTORNEY WINGROVE: Very few questions, Your Honor.

RECROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q When you made your statement to the police on May 30, 2013, did you tell the truth then too?

A I did.

Q Okay. And your testimony today is you were walking back to the residence with your back turned to Mr. Mitchell, right?

A Excuse me?

Q When Mr. Mitchell first came out of his residence, you were walking back to your residence with your **[137]** back turned to Mr. Mitchell, right?

A The first time when I was in the process of hanging up with the sister, yes.

Q Sure. And he was saying things to you, and you were afraid he was going to jump you, right?

A No. I'm not saying that. I just -- I wasn't going to allow myself to be in a situation because I don't know the gentleman. I don't know what he's capable of. I have, you know, very minimal contact with this man in just a couple day period of time.

Q Okay. And you're also telling the truth on May 30th when you said to the police -- when you said in your statement to the police at that time stepped out of his back door and he also came out with a bag of

trash. Jerry started to walk to the trash bin and also almost fell. That was the truth too, right?

A To my best knowledge, yeah.

Q Okay. And your understanding is if you cooperate with the prosecution today things may go more favorable for you in probation?

A No.

Q No?

A That has never been brought to my attention, absolutely not.

[138] Q A few minutes ago didn't you testify about cooperating?

A I did. It's in my probation rules.

Q Okay. And if you violate your rules what happens?

THE COURT: I think we're going beyond the scope.

BY ATTORNEY WINGROVE:

Q Okay. What's your understanding of cooperation?

THE COURT: I think we're going beyond the scope of redirect.

ATTORNEY WINGROVE: Okay. I'm done. Thank you.

THE COURT: Thank you, Mr. Swenson. You can step down.

Next witness please.

ATTORNEY HABERMAN: Thank you, Your Honor.

The State will call Carol Mitchell.

**** CAROL MITCHELL, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and spell your last name.

THE WITNESS: My name is Carol Mitchell.

Last name spelled M-I-T-C-H-E-L-L.

THE COURT: Go ahead please.

[139] DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Ms. Mitchell, where do you live?

A In Muskego.

Q Okay. And that's down in the --

A Southwest of Milwaukee by about 15, 20 miles.

Q Okay. And how long have you lived down in that area?

A Forty-eight years.

Q And roughly how old are you?

A I just turned 73 yesterday.

Q Really. Well, happy birthday I think. It's a hard way to spend it I know.

A Yeah.

Q You know the defendant?

A I do.

Q And what's your relationship to him?

A He's my son.

Q On May 30, 2013, did you speak to the defendant by telephone?

A I don't know whether it was May 30th. I can't remember the date. But I talked to him the end of May sometime. He called me on his cell phone.

Q And what did he tell you?

A He called me to say goodbye.

[140] Q And what, if anything, did that mean to you?

A I thought possibly he was going to die because he had nowhere to go except here.

Q And did you notice anything about his tone of voice and the way he talked to you?

A He was a little slurred, but I don't know why.

Q Okay. Did he have any sort of tone to his voice that you would recognize with any sort of feelings that he has?

A Nothing other than that he loved me and he wanted to -- his last words to say to me.

Q Based upon his statements what were you concerned about?

A I was concerned he was going to die. I was distressed.

Q Okay. And what happened next then?

A After our conversation -- I can't remember the rest of it. I tried to keep him on as long as I could. I did ask him where he was because I planned to call other people to try and find him in time.

Q Okay.

A Because at that time he was alive.

Q Okay. And when you spoke to him, once that conversation was over, did you speak to other family members, any other family members of yours?

[141] A Yes.

Q Okay. And how did the phone call end? Did everyone say goodbye and the phone hung up?

A No. No. We kind of lost the call. And then I tried to make other calls, like, to the Police Department. And I misdialed all the time, so I asked my daughter to call to get him some help.

Q Okay. And was your daughter with you at your house?

A Yes.

Q Okay. When your -- did you see your daughter call people?

A I can't remember.

Q Okay. On May 30th or around the end of May of 2013, what vehicles, if any, did you -- did the defendant have access to that you know?

A He had my silver van.

Q Okay. And what kind of van is it?

A It's a Dodge 2000 Sport.

Q And that's a minivan.

A Caravan Sport.

Q Caravan Sport. Is that a minivan type vehicle?

A Yes.

Q And do you know the registration, the license plate number?

[142] A The registration, no, but the license plate number I remember clearly.

Q What was it?

A Because it was weird. It was 404-BTN. At first I thought it meant British thermal units, but that didn't go with. It just stuck there. I'm a scientist. What can I say.

Q Fair enough. When was the last time you saw the van before the end of May?

A The last time I had been up to visit him.

Q Do you know roughly when that was?

A No. It was within a month or two.

Q And at that time did you actually see the van?

A Yes.

Q And did you notice any damage at that time to the vehicle?

A I noticed the mirror on the driver's side was broken.

Q Can you describe it?

A No. Just broken.

Q Did you notice any other marks nearby that?

A No. Didn't look for any either.

[143] Q Did you and the defendant go anywhere in the van? Did you use the van?

A Pardon?

Q Did you and the defendant go anywhere in the van or did you drive the van?

A Not that I can remember.

Q When you spoke to the defendant on the phone, did you notice any signs that he might be intoxicated?

A I've heard him when he was intoxicated years and years ago, so I know what that voice sounds like. And it sounded similar or on account of meds he had taken.

ATTORNEY HABERMAN: Okay. Nothing further then, Your Honor.

THE COURT: Cross-exam.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q Few questions, ma'am. I'll try to keep this short. I know this must be unpleasant for you. You spoke to Jerry and had a troubling conversation sometime late May of 2013, correct?

A Yes.

Q And you said he sounded strange. Have you ever seen Jerry when he was having a reaction 'cuz his meds weren't properly titrated?

A Yes. I think I have.

Q Did he sound like that?

A Similar.

[144] Q Now, do you know how this van got from St. Clair to -- back to the apartment?

A Yes. I drove it.

Q Okay.

A This is after he was taken to the hospital.

Q Sure. And where did you find the van?

A I found the van at the end of St. Clair facing the opposite of the lake. So that would be west. And I drove it back to his apartment.

ATTORNEY WINGROVE: Permission to approach the witness?

THE COURT: You may.

BY ATTORNEY WINGROVE:

Q I'm going to hand you some photographs that have been labeled Exhibit 4 and Exhibit 5.

THE COURT: I'm sorry. Mr. Haberman, have you seen those exhibits?

ATTORNEY HABERMAN: Yes, Judge. I know they're discovery photographs.

ATTORNEY WINGROVE: I offered him copies too.

THE COURT: Thank you.

BY ATTORNEY WINGROVE:

Q Can you identify that vehicle?

A That looks like my van because I recognize the stickers in the front window that I placed there **[145]** for Muskego County Park. It looks like it, but I can't tell for sure because I don't see the license plate on here.

Q Sure. And if you look at I believe it's Number 4, there's some scuff marks to the left-hand side of the van?

A Okay. I see 'em now.

Q Do you have any belief as to how they got there?

A Jerry had told me that this happened.

ATTORNEY HABERMAN: Judge, I'm going to object. That's a hearsay statement.

THE COURT: What's the relevance of the scuff marks?

ATTORNEY WINGROVE: I anticipate there may be some suggestion that the damage to the mirror and the scuff marks on the side of the van were occurred on May 30th.

THE COURT: Well, the question was brought up on direct, but I agree the explanation would be hearsay.

THE WITNESS: Should I answer that then?

ATTORNEY WINGROVE: No.

THE COURT: That's fine, ma'am.

BY ATTORNEY WINGROVE:

Q Were you surprised to see the scuff marks on the side of the van?

A No.

[146] ATTORNEY WINGROVE: No further questions. Thank you, ma'am.

THE COURT: Any redirect?

ATTORNEY HABERMAN: No.

THE COURT: Ma'am, thank you very much.

THE WITNESS: I'm done?

THE COURT: You're free to stay for the rest of the trial if you'd like.

ATTORNEY WINGROVE: I'd ask that 4 and 5 be received, Your Honor.

THE COURT: They're received. In fact, if there's no objection, all marked exhibits will be received thus far.

ATTORNEY WINGROVE: Thank you.

THE COURT: Mr. Haberman, your next witness.

ATTORNEY HABERMAN: State will call Officer Alexander Jaeger. Judge, I don't intend to recall Ms. Mitchell at all. I don't know if --

THE COURT: It's a fair question what you're getting to. Mr. Wingrove, are you going to call Mrs. Mitchell?

ATTORNEY WINGROVE: No, Your Honor.

THE COURT: All right. So if she's not going to be called, then she's not sequestered, and she can stay in the courtroom.

[147] ATTORNEY WINGROVE: Thank you.

**** OFFICER ALEXANDER JAEGER, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and spell your last name.

THE WITNESS: Officer Alex Jaeger,

J-A-E-G-E-R.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Officer, how are you employed?

A City of Sheboygan police officer.

Q And how long have you been a police officer with the City of Sheboygan?

A With the City for almost five years.

Q Do you have other law enforcement experience?

A Yes. I have approximately three years with the Sheriff's Department here in Sheboygan County as a patrol deputy.

Q So about eight total years in law enforcement?

A Yes.

Q Describe your education, training, and your background prior to becoming a police officer or sheriff's deputy.

[148] A I have a two-year associate's degree accompanied by state academy certification from Northeast Wisconsin Technical College.

Q And did you receive some specific training for being a police officer?

A Yes I did.

Q Just briefly describe that.

A We have hands-on training as well as classroom training. Training from report writing, professional communications, firearms, arrest tactics, driving skills.

Q And do you have any specific training in relating to identifying people who might be under the influence of alcohol?

A Yes I do.

Q And describe that training for the jury please briefly.

A It's going to be training through the degree that I was a part of. And it was hosted by or run by the National Highway Traffic Safety Administration. There are standardized tests that are used throughout the country by officers to indicate whether or not somebody is impaired to operate a motor vehicle.

Q And did you pass your training in relation to field [149] sobriety tests for indicating impairment?

A Yes I did.

Q And did you receive certification as a result?

A Yes I did.

Q And was that back during your education phase prior to becoming a law enforcement officer?

A Yes it was.

Q And how many roughly operating while intoxicated investigations have you been a part of?

A I've been a part of most likely several hundred.

Q What shift do you typically work?

A Either night shift or afternoons.

Q How frequently in those shifts do you come in contact with dunk drivers?

A Several times a month.

Q And how frequently do you deal with intoxicated persons on that shift?

A Could be several times a shift, multiple times during my workweek.

Q Every time you conduct an investigation into someone for OWI, do you arrest them every time?

A No.

Q And what happens in those cases?

A In those cases either the operator is allowed to drive away as probable cause or elements of the **[150]** offense were not met. A taxi could be offered to somebody or other arrangements for a ride from the scene of the stop.

Q In the cases that you don't arrest them, what, if any, sort of observations have you made about their ability to safely drive or their level of impairment?

A I'm sorry. Can you repeat the question?

Q Sure. You know, in those cases that you don't arrest someone, what have you observed generally about them that leads you to not make an arrest?

A Basically their ability to multitask during both the instructional phase or the performance phase of the standardized tests that are administered. Oftentimes they don't provide enough clues or indicators of impairment, and your suspicion is not enough to make the arrest. And they are often released.

Q Okay. As part of your life experience, have you observed people -- and now this is not when you're a cop on duty -- in your general life experience have you come in contact with people that are intoxicated?

A Yes.

Q Do all intoxicated people act the same?

[151] A No.

Q What are some of the signs that you frequently see?

A It varies from vomiting, becoming quite ill. Some are unable to speak clearly, their words are slurred. They sometimes have greater difficulty in walking or following directions or, you know, even maintaining a conversation. They might drift off and be easily distracted.

Q Do these signs that you have seen, are they present every time you see an intoxicated person?

A No.

Q Have you received any sort of training regarding driving behaviors that might be indicative of impaired driving?

A Yes.

Q Tell me about that.

A Things like swerving within their lane of traffic, stopping at a green light, speeding, driving very slowly, anything that might cause an accident sometimes is of concern. Basically it's a result of not being able to multitask, receiving information being that there's a stop sign ahead of me or a traffic signal that tells me I need to do something, or not being able to follow through with that actual stop sign or coming to a stop. Their **[152]** attention is divided, and they have a difficult time focusing on receiving that information and performing what's been asked of them.

Q And do you always encounter this driving behavior that's consistent with impaired driving in every OWI case that you investigate?

A No.

Q Why is that?

A Sometimes it's reported by a witness who's willing to make a statement to police about the driving behavior. Other times it's a result of a motor vehicle crash where we get there after. Somebody's driving and they've since crashed, and we're now investigating it. Other times it's an issue where you end up seeing them getting out of a vehicle and they are stumbling and, you know, having difficulty walking, maintaining balance.

Q So let me direct your attention then specifically to Thursday, May 30, 2013. Were you working that afternoon?

A Yes.

Q Do you remember what shift you were working?

A Second shift, or afternoon shift.

Q So directing your attention to 3:17 p.m., did you receive a dispatch to 1127 North Eighth Street in **[153]** the city and county of Sheboygan, state of Wisconsin?

A Yes I did.

Q And what was that dispatch in regards to?

A It was a check welfare complaint.

Q And what information had you received about that situation you were going to go to?

A Male subject later identified as the defendant had made some telephone calls to family indicating that he was possibly going to attempt to harm himself or end his life by some means.

Q And why specifically 1127 North Eighth?

A That's where the complainant was at.

Q And where -- did you arrive at that address?

A Yes I did.

Q Can you describe this area for the jury?

A It's a upstairs apartment shared by several subjects.

Q And this building itself, does it have multiple addresses listed on it?

A Yes it does.

Q Whom, if anyone, did you speak with when you got there?

A Alvin Swenson.

Q Describe the nature of your contact with him.

[154] A Alvin was very excited. He seemed very concerned about some information he had received that the defendant was potentially suicidal and that he had just seen the defendant driving away from his apartment in a vehicle.

Q Did you take -- did you sit down and speak with him? Or tell me about how you got information from him.

A Based upon the fact that Mr. Swenson had told me the defendant appeared intoxicated, was making suicidal statements, and was apparently behind the wheel of a vehicle, I needed to obtain the information very quickly. There's some exigency there to relay information to other officers so that we can quickly intercept the vehicle or somehow make contact with the defendant to prevent him from harming himself or others.

Q And as a result do you take a formal written and recorded statement from him?

A No I don't.

Q Tell me about the type of information or generally what you're trying to get out of him.

A What I'm trying to get is basic information that includes vehicle description, the description of the defendant, the type of condition the defendant [155] was in at the time that the witness had seen him, and any other factors such as the stumbling and falling that was observed by the complainant.

Q In this -- when you spoke to Mr. Swenson did you speak to him inside or outside?

A It was inside.

Q And where inside this apartment did you speak to him?

A In a common area, like, a dining room area I think it was.

Q Okay. And where in relation to the whole building is this common area that you're speaking to him in?

A Right about in the middle.

Q Okay. And as you're speaking to him there, do you have him complete a written statement at that moment?

A Not at that time.

Q What do you do after getting some information from Mr. Swenson?

A Mr. Swenson takes me to the windows that are on the east side of the building, and he kind of gives

me a brief layout of where things were at the time such as the vehicle, the garbage, and where Mr. Mitchell had been seen walking and driving away from. I was able to confirm that the van that was **[156]** reported that he had left in was not there at this time, not that it had returned home and parked in the same area between the time that we received the police call and the time that I arrived and started talking to him.

Q Let me stop you there, Officer. How did you confirm that the vehicle was not back, that it hadn't returned?

A I looked through the window, and I did not see it out there.

Q Okay. When you were speaking to Mr. Swenson, were you in the room that you were in, did it have windows to see the back area?

A Yes it did.

Q Okay. Could you see the parking lot of the other residence?

A Yes.

Q Are you familiar with what the address of that other residence is?

A 723 St. Clair Avenue.

Q And that's also in the city of Sheboygan, Sheboygan County, Wisconsin.

A Yes it is.

Q After you have taken the statement from -- the brief statement from Mr. Swenson and after you have **[157]** checked out the window, what, if any, information do you gather from other sources?

A I begin looking in our in-house database. It's a system in our computers that we use to locate prior contacts with people, potentially vehicle descriptions, more than just a gray van is what I had already been given. I was trying to look for a license plate that we might have had a previous contact with the defendant in that vehicle. And I eventually made phone contact with Carol Mitchell.

Q And did you have an opportunity to actually speak to her?

A Yes I did.

Q And did she provide you the license plate or registration for the vehicle?

A Yes she did.

Q And what was that? .

A 404, "B," as in boy; "T," as in Tom; "N," as in Nora.

Q Officer, I'm going to show you what's been marked now as Exhibit 6. Can you identify that please?

A This is a certified copy of Vehicle Details from that vehicle owned by Ms. Carol Mitchell.

Q And who is the source of this information in this exhibit?

[158] A The State of Wisconsin Department of Transportation.

Q And what does it say about the vehicle plate and its registration?

A It describes it as a 2000 Dodge. Provides the vehicle's specific VIN number, that it's registered to Carol Mitchell, provides her address in Muskego, and

the license plate of 404-BTN. And it also says the expiration or the registration is current through April 30th of 2014.

ATTORNEY WINGROVE: If I might interrupt for a minute. We would stipulate to the admission of that document.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q Officer, on the second page of that does it indicate the most recent color of the vehicle details?

A Yes it does.

Q And what is that?

A Gray.

Q Okay.

ATTORNEY HABERMAN: Your Honor, given the stipulation, I just move for that admission into evidence.

THE COURT: It's received.

[159] BY ATTORNEY HABERMAN:

Q Is that consistent with the information you received from your computer records check?

A Yes.

Q And what, if anything, did you do with this information?

A I provided the information to other officers asking them to check the area for this vehicle, again, in an attempt to intercept it before any harm could be done.

Q What time was the original dispatch in this case?

A 3:17 p.m.

Q And what -- you seem pretty specific on that time. Tell me about how you're so specific at 3:17.

A When a call comes in to police dispatch, a case is generated on our computer system that we use. And there's time stamps that go along with that.

Q Is 3:17 a fair indicator of what time you arrived at the 1127 address, or is there -- did you arrive sometime after that?

A That's the time that the call would have been dispatched on the screen. Probably would have taken me five to ten minutes to get there.

Q Do your -- once you ultimately got to the residence, you spoke to Mr. Swenson, you spoke to **[160]** Ms. Mitchell, you made your observations about the parking lot, and then you check this registration and you communicated it to officers, about how much time had passed?

A Including the contact I had with Mr. Swenson?

Q Yes.

A Maybe a half hour. Maybe a little more.

Q So we're roughly at about 3:45.

A Somewhere in there, yes.

Q Okay. Maybe a little later than that.

A Correct.

Q What happens after you're putting this information out?

A While I'm putting this information out, I receive information on the police radio from one of our community service officers who was also in the area both attempting to locate the vehicle and doing his normal duties. He informed me that he observed a male subject in the area on foot approaching our location. He seemed to be possibly bothering a female pedestrian.

Q And what, if any, observations did you then make?

A I then got out of my car and walked in that direction, and it was right on -- little east of the corner of North Eighth Street and St. Clair [161] Avenue. And I observed a male subject wearing dress shoes, jeans, no shirt, and some type of ball cap walking towards 723 St. Clair Avenue.

Q Which direction was that male party walking?

A Sort of south, southeast, kind of at an angle.

Q Okay. And what street were -- did you observe them walking on?

A Pretty much at the intersection of North Eighth Street and St. Clair Avenue. More specifically on the northeast corner.

Q Officer, we do have Exhibit 1 which is our map. As a City of Sheboygan officer, are you familiar with the streets in the general area?

A Yes I am.

Q As you look at that map today, Exhibit 1, does that appear to be a fair and accurate representation of the street and building layout?

A Yes it does.

Q Officer, I'm going to give you a green marker. I'd like you to just come down and indicate where, if at all, your squad car was parked when you originally made contact with Mr. Swenson, and then we'll pick up from there. And indicate with a "PC" for police car where you would be, and draw it a little bit and bold it in a little bit for us too.

[162] A (Complying.) Right about here on North Eighth Street facing southbound parked on the side of the street.

Q So you're basically across the street from where you were taking the report.

A Yes.

Q And are you in your squad car when you get the radio communication from your community service officer?

A Yes I am.

Q And where do you make your first observation of where the -- this male person is?

A I exited my car here and began walking on foot as I had been radioed by the community service officer that the subject was walking in this area. Figured it would be easier for me rather than turning around my car and maneuvering around traffic just to get out on foot and made contact with him in the roadway right about here.

Q Will you indicate maybe a star where you initially made your contact with him. Again, make sure it's nice and bold so we don't have any difficulty seeing it.

A (Complying.)

THE COURT: Just for the record that's just **[163]** to the east of Eighth Street and St. Clair Avenue; is that correct?

THE WITNESS: Yes.

THE COURT: Just a little bit south of the sidewalk on the north side of the street?

THE WITNESS: Yes.

BY ATTORNEY HABERMAN:

Q So your contact was actually with the person in the street.

A Yes.

Q What is that business, if you know, just to the north of St. Clair? What's right on that corner there?

A Right here there's a large funeral home facility.

Q Okay. You can have a seat again back up there. I'll take the marker back.

When you made contact with this male individual that was walking, what, if any, signs did you observe to indicate whether or not that person had been drinking?

A Immediately before even making contact with him I could see him walking. He was appearing to stumble. His arms were quite, I guess, droopy and kind of bouncing as he walked. And as I continued to make direct personal contact with him, I could **[164]** smell the very strong odor of intoxicants on his breath. As I began to identify myself and ask him who he was, his words were very slurred and thick tongued.

Q Who is that person that you made contact with?

A Gerald Mitchell.

Q Do you see him in court?

A Yes I do.

Q Can you describe what he's wearing and where he's seated for the jury?

ATTORNEY WINGROVE: We'll stipulate again that the witness has already identified Gerald Mitchell.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q What, if any, significance did you place on your observations about his demeanor?

A He was quite hostile towards police. When we were trying to ask questions about who he was and where he was coming from, he was quite belligerent. Several vulgarities were used, not specifically at me or anybody in general but just in conversation I guess.

Q And did these observations and demeanor that the defendant displayed, did it indicate anything about his level of intoxication?

[165] A I felt his level of intoxication was very high based on the walking that I had observed, nearly stumbling. And in fact, when I initially made contact with him in the roadway, I asked that we step out of the roadway, and we actually went to the southern sidewalk of St. Clair Avenue. And he nearly tripped over the curbing from the street to the sidewalk.

And at that point, again, I could smell the strong odor of intoxicants. His eyes were very red, glossy, and bloodshot. His speech was very slurred, and it

appeared he had difficulty in maintaining balance. At some points he would sort of take several steps backwards kind of holding his arms out to the side a little bit trying to maintain his own balance while standing on a fairly level city sidewalk.

Q And, you know, are these observations pretty typical for an OWI investigation, or do your observations range in any way?

A They vary quite a bit. He was at the higher scale of the spectrum as being very intoxicated based on my training and experience.

Q Did you notice any gray minivans in the area that matched the description you were looking for?

[166] A No, I did not.

Q Did you speak to the defendant specifically?

A Yes.

Q What did he say?

A I asked if he had been drinking anything since he drove his van, and he told me he had not. He told me he was drinking in his apartment but would not tell me who he was drinking with or if he was with somebody.

Q Did he indicate anything about where his vehicle was?

A He told me he left his van down by the beach as he figured he was too drunk to drive.

Q Did he make any statements to you or did you ask any questions about whether or not he was drinking near the lake?

A He said he had not had any alcoholic drinks from leaving his apartment till the time he returned home.

Q Till the time he returned home?

A Yes.

Q When did he return home?

A When I made contact with him there. He was right out in front of his apartment there.

Q Okay. What significance, if any, do you place on **[167]** his statements?

A It showed that he had not consumed intoxicants in the roughly half-hour period that he had been gone from his residence according to Mr. Swenson's statement to me. It was roughly about a half hour, maybe a little bit longer. But he was quite intoxicated, and it would be very difficult to be that intoxicated in that amount of time where he would have had to consume a lot of intoxicants --

ATTORNEY WINGROVE: Objection. Foundation.

THE COURT: Sustained.

BY ATTORNEY HABERMAN:

Q Officer, when you observed his demeanor and you couldn't find the van, what, if any, efforts did you make to locate his van?

A Again, several officers had been asked to check the area for it and did subsequently find it on St. Clair Avenue in the 300 block.

Q Did you ask the defendant to perform any field sobriety tests?

A Yes I did.

Q And generally for the jury what are field sobriety tests?

A Those are the standardized field sobriety tests that are used typically on the roadside during a **[168]** traffic stop investigation where we feel an operator might be impaired. And these are standardized sobriety tests that are used basically throughout the country.

Q What generally are you looking for when you ask someone to submit to field sobriety tests?

A The first thing I check for is HGN. It's also referred to as Horizontal Gaze Nystagmus, or the involuntary jerkiness of the eyes. Next I do the -- or administer the Walk and Turn Test as well as the One-Legged Stand Test.

Q Why these three specific tests?

A These are tests that have been found to be accurate in indicating whether or not a motorist is impaired to be operating a motor vehicle.

Q And are you taught through your training to use these particular tests?

A Yes I am.

Q And when you're administering these tests, generally what sort of comparisons are you looking for? What kind of observations?

Officer, I want to clarify. I'm not asking you to go into what are the tests and what clues or whatever you're looking for. But generally what are you looking for?

[169] A Their ability to divide their attention between an instruction that's given to them in the performance of the instructions and the tests that were given to them. You know, at the beginning of each individual test, there's what's called the instructional phase position. They're standing with their feet together, told not to move until you're done explaining and demonstrating a portion of the test that you're about to ask them to do. It's a divided-attention test. And typically somebody that's impaired will step out or forget that they're supposed to be in that phase or in that stance that you previously put them in.

Q You characterize these field sobriety tests as a divided attention. What significance does a divided attention test have at all in relation to someone's ability to drive?

A Our divided attention tests, again, have an instruction phase where we give them indications and direct simple statements on how they are to perform the tests. They then take that information and attempt to perform the test the way that was explained and demonstrated for them.

It's very similar to driving down the road. As you're driving you have to be listening **[170]** for audible clues, you know, potentially a siren behind you, a train horn, car horn, something similar to that. You have to pay attention for stop signs, turn signals, vehicles in front of you hitting the brakes, slowing down, speeding up. While you're driving a vehicle you have to be able to multitask, watching, listening, and reacting to what you're observing at the same time.

Q So why -- has -- let me ask you this. In your OWI investigations have people passed field sobriety tests?

A Yes.

Q And if they pass the field sobriety test do you make usually an arrest?

A No.

Q Did the defendant perform field sobriety tests in this case?

A No, he did not.

Q And did you make an arrest of the defendant still?

A Yes.

Q Why did you make the arrest without having the benefit of the field sobriety test knowledge?

A Based on the totality of the circumstances, the defendant's admission to drinking, and his current physical condition not being able to maintain his [171] own balance, inability to speak clearly, simple tasks like walking and things like that were very difficult for him. And he was asked to do the field sobriety tests but did not.

Q Based upon your observations of the defendant as well as your training and experience with OWI investigations, were you able to form an opinion about his condition during your contact with him on that Thursday?

A Yes.

Q What was that opinion?

A I felt that while he was operating a motor vehicle in the short amount of time that he would have been impaired.

Q And what would that, if anything, would that impairment be caused by?

A Most likely alcohol.

Q And why do you say alcohol?

A Based on the odor of intoxicants on his breath and his own admission to drinking.

Q Did he make any statements to you regarding his medication?

A No.

Q Did he ever indicate anything about his medication, taking any medication at all at that point?

[172] A No.

Q Do you know what time he was arrested by you?

A I believe it was 4:26 p.m.

Q And how is it that you have a specific time of 4:26 p.m.?

A When we have somebody in custody we advise our dispatchers on the radio so that they do know we have somebody in custody. And again, that is something that's time stamped into the case.

Q And basically about how long have you had an interaction with the defendant by the time you get to 4:26? If I understand right your original call, your original reported time was 3:17.

A Correct. It would be 20, 25 minutes maybe.

Q And during that entire interaction with the defendant, did your opinion change about his ability to safely operate?

A No.

Q Once he was arrested was he placed in your squad car?

A Yes.

Q And where, if anywhere, did you take him?

A Directly to the Police Department.

Q And what, if anything, did you notice about his condition while in the back of the squad car on [173] your way to the Police Department?

A There wasn't a whole lot of change at that time until we got to the police station.

Q Describe that.

A When we got into the sally port, which is a secure area where we either place our detained subjects in or remove them from our squads, he had difficulty in getting out of the car at that point. He began to be appearing more intoxicated.

Q Did you notice anything more about his physical state at that point?

A He had a greater inability to maintain his own balance, standing upright, or walking.

Q Did you have to use the assistance of any other person at that point?

A Yes. With the assistance of Lieutenant Mittelstaedt.

Q After having contact with him at the Police Department where, if anywhere, else did you go?

A Directly to Memorial Hospital here in the city of Sheboygan.

Q About how far away is the Sheboygan Police Depa-tment from your original scene of Eighth and St. Clair?

A Couple miles.

[174] Q Roughly how long for you as an officer to drive?

A Just a few minutes.

Q Okay. So after you drive from there to the Police Department, about how long at the Police Department for, just roughly?

A Ten, fifteen minutes.

Q And then you drive to the Sheboygan Memorial Hospital.

A Yes.

Q And what's the purpose of taking him to the hospital?

A It's up there that we would continue our investigation with a legal blood draw.

Q And once you got to the hospital, what, if anything, happened?

A His condition seemed to decline. He began to become limp, especially when we got to the hospital. I asked him to come out of the car, and he was so intoxicated it appeared that he was nonresponsive. He wouldn't answer to me. He wouldn't -- it was almost like he was passed out. His head was slumped down. His whole body was very limp. It was pretty much the seat belt and the back seat rest holding him

upright. And again, I needed the assistance of another officer to have **[175]** him come out of the car.

Q Did you ultimately get him out of the vehicle?

A Yes I did.

Q And did you go inside the emergency room area of the hospital at that point?

A Yes.

Q Officer, I'm going to show you what's been marked as Exhibit 7. Can you identify this for the jury please?

A This is the Informing the Accused form attached to this case.

Q And did you read this form to the defendant at the hospital?

ATTORNEY WINGROVE: I'm going to object as to relevancy. We stipulated to the blood draw already. I don't know what we're trying to accomplish with this.

THE COURT: Mr. Haberman?

ATTORNEY HABERMAN: Judge, generally in an OWI trial I do have some foundational requirements to go through the Informing the Accused. That's why I'm doing what I'm doing, Judge.

THE COURT: Well, are you stipulating to the admission of Exhibit 7?

ATTORNEY WINGROVE: Sure.

THE COURT: Okay. They're going to admit to **[176]** that, Mr. Haberman. I think that takes care of your requirements.

ATTORNEY HABERMAN: Thank you. That will speed things up a little bit.

BY ATTORNEY HABERMAN:

Q When you did speak to the defendant, you read the form to him, and you had -- at the end of the form you had to ask him a question?

A Yes.

Q Was he able to respond to you?

A He was not. He was so incapacitated and basically passed out he couldn't respond to me in any way.

Q After you didn't get a response to him, was a blood sample taken from him?

A Yes it was.

Q Okay.

ATTORNEY HABERMAN: Your Honor, I'd ask that the --

THE COURT: If you're looking for the stipulation I have it.

ATTORNEY HABERMAN: I'd ask the Court read the stipulation. It's marked as Exhibit 3.

THE COURT: It's marked as Exhibit 3. And Mr. Wingrove, any objection to reading the stipulation right now?

[177] ATTORNEY WINGROVE: No, Your Honor. Thank you.

THE COURT: Ladies and gentlemen, I'm going to read to you a -- verbatim a stipulation that was arrived at by Mr. Haberman and Mr. Wingrove and Mr. Mitchell.

On Thursday, May 30, 2013, at approximately 4:26 p.m. the defendant was placed under arrest for operating a motor vehicle under the influence of an intoxicant by Officer Alexander Jaeger of the Sheboygan Police Department in the city and county of Sheboygan, state of Wisconsin.

On Thursday, May 30, 2013, at approximately 5:59 p.m. the defendant had a sample of his blood drawn at the Sheboygan Memorial Medical Center in the city of Sheboygan by Jennifer Gatzke. Ms. Gatzke is qualified to perform the blood draw. Ms. Gatzke properly labeled and sealed two vials of the defendant's blood into blood draw kit.

Three, after the blood draw was completed Officer Jaeger received the defendant's blood samples within the blood draw kit from Ms. Gatzke. Officer Jaeger placed the blood draw kit into the outgoing mail at the Sheboygan Police Department for it to be mailed through the United States Postal Service to the Wisconsin State Laboratory of Hygiene in Madison, Wisconsin, for testing.

On June 3, 2013, Lorrine Edwards, an ethanol analyst **[178]** with the Wisconsin State Laboratory of Hygiene in Madison, Wisconsin, received the defendant's blood sample in the United States mail. On June 3, 2013, Analyst Edwards tested the blood evidence for the presence of ethanol. Analyst Edwards is properly trained and qualified to perform analysis on blood samples to detect the presence of ethanol.

Based on Analyst Edwards' analysis, the final results were 0.222 grams per one hundred milliliters of ethanol within the defendant's blood. Analyst Edwards' results are true and accurate to a

reasonable degree of scientific certainty. These results were reported in a laboratory report dated June 4, 2013, for specimen number 13FX008700.

The lab report dated June 4, 2013, for specimen number 13FX008700 is relevant and admissible in this jury trial.

And that is signed by Mr. Haberman, Mr. Wingrove, and Mr. Mitchell.

Mr. Haberman?

ATTORNEY HABERMAN: Thank you, Your Honor. I will also have marked the lab report that was referenced by that stipulation. And that is being marked as Exhibit 8. And with that stipulation, we're just offering it into evidence as well.

[179] BY ATTORNEY HABERMAN:

Q Officer, when you originally had been assigned this case, were you operating with the assistance of any other officer?

A I had other officers checking the area.

Q Was anyone else near or on scene with you?

A Officer Fickett.

Q And what was -- was he a backup officer to you?

A Yes.

Q Okay. Did you give him any particular assignments?

A He was to obtain further information or written statement from Mr. Swenson.

Q Why would you have Officer Fickett obtain information from Mr. Swenson when you already have obtained information from Mr. Swenson?

A The information that I originally obtained was just the basic facts that I could obtain the quickest because I had a great deal of concern for Mr. Mitchell's personal safety as well as the safety of the public. I was informed that he was potentially suicidal and may have an intent on harming himself and furthermore was possibly operating while intoxicated based on Mr. Swenson's original statement to me.

Q The streets in the city of Sheboygan specifically [180] near St. Clair that's depicted in Exhibit 1 on the map, is that a public road?

A Yes.

Q Does that public road continue through the existence of St. Clair, in other words, in each direction of the map?

A Yes it does.

Q Okay. The general streets around the city of Sheboygan, are all of those public roads as well?

A Yes.

ATTORNEY HABERMAN: No further questions, Your Honor.

THE COURT: Ladies and gentlemen, if anybody would like a break now we can do an early one. Otherwise we'll wait until cross-exam is done for Officer Jaeger. Again, if anybody wants to stand up and stretch feel free to do it now before we start on cross-exam.

The comment I'm going to make is not at all reflective of the trial, but I always find myself about 2:30 in the afternoon on a jury trial needing to stand up and stretch. If anybody wants to do it, feel free to do it. I'm glad there's at least one person who feels the same way I do. With that, Mr. Wingrove, whenever you're ready you can commence with cross-exam.

ATTORNEY WINGROVE: Thank you.

[181] CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q As a police officer it's important to make accurate reports, correct?

A Yes.

Q And you would say is your recollection -- do you know when you wrote your report on this incident, your first report? About the same day?

A Yeah.

Q Okay. And was your recollection of those events better when you wrote the report or are they better now? Or is it better now? I'm sorry.

A It's roughly the same.

Q Okay. I'm looking at page 3 of 9 in your report at the second full paragraph. And you're talking to Alvin Swenson. And your report says (as read), "He said that he immediately went to the window, looked outside to the parking lot, and saw Gerald getting into the gray van and that he drives after throwing a bag of garbage into a pile in the backyard." Do you have any reason to dispute that?

A The way the report is written is because I obtained the quickest information with the basic facts to continue with my investigation.

Q And it's your testimony today that that was [182] accurate, right?

A Yes.

Q That's what Mr. Swenson said to you, right?

A Yes.

Q Okay. And then it goes on to say (as read), "He shouted out the window to Gerald asking what was wrong, and Gerald made a vague statement about ending his life because of ongoing difficulties." That would be correct too, right?

A I believe so, yes.

Q Okay. (As read) "Alvin said he contacted the police, and just prior to our arrival Alvin had left the area in a gray van." That's what your report says, correct?

A Yes.

Q And it's really a mistake. You didn't mean to say Alvin, you meant to say Gerald left in a gray van.

A Yeah. That would be the case.

Q Sure. Now, when you spoke to Alvin Swenson did he say that he saw Jerry consume any alcohol?

A No.

Q Did anyone think to look in the trash bags?

A No.

Q Now, we had a preliminary hearing in this matter, and you testified at the preliminary hearing.

Your [183] testimony was true and accurate to the best of your ability, correct?

A Yes.

Q And I think you've already been asked this, but you're familiar with the streets of Sheboygan, correct?

A Yes. Most of them.

Q I'm going to ask this be marked as an exhibit. I'm putting up what's been marked as Exhibit 9. Can you identify that?

A It appears to be a aerial photograph of the specific location we're speaking of and the surrounding neighborhood.

Q It's consistent with your understanding and impressions of downtown Sheboygan?

A I would say so, yes.

Q Okay. What I'm going to ask you to do is come down and mark Mr. Mitchell's residence with the

letter 1.

A Mr. Mitchell's?

Q Yes. Please.

A (Complying.)

Q Now, in your report you said the car was located on Michigan, but in fact, the car was located on the 300 block of St. Clair, correct?

[184] A That's correct.

Q And could you mark with an arrow facing which direction the car was pointed about or was located on St. Clair if you know?

A Somewhere in this area right here facing west (complying).

Q Okay. Now at the preliminary hearing you were asked -¬

THE COURT: What page are you on?

ATTORNEY WINGROVE: Starting at page 19, line 25. So I believe this would have been State's direct.

BY ATTORNEY WINGROVE:

Q (As read) "Okay. And how -- and actually just before you saw him you said that he was walking back from further north towards Eighth, right?

"ANSWER: Just north of our location, yes.

"QUESTION: Okay. How far is that from the defendant's apartment?

"ANSWER: About a half block I think 'cuz it was -- I believe it was the alley just north of the funeral home that's right there. Eighth and St. Clair is where he was observed by our community service officer."

So could you with a letter 2 mark the **[185]** area just north of the funeral home that's right there?

A (Complying.) I'm sorry. Which specific location are you asking me to identify?

Q The line of questioning was when you first became aware of Mr. Mitchell. And the answer was "about a half block I think 'cuz it was -- I believe it was the alley just north of the funeral home that's right there."

A Somewhere in this area right here is where our community service officer would have said he saw him walking.

Q Could you put a number 2 there.

A (Complying.)

Q Thank you.

ATTORNEY WINGROVE: I'll ask that 9 be received.

THE COURT: Any objection?

ATTORNEY HABERMAN: No.

THE COURT: It's received.

BY ATTORNEY WINGROVE:

Q Now, when you first spoke to Jerry Mitchell did you record the conversation?

A No.

Q Why not?

[186] A It's not a common practice to record conversations with people.

Q Okay. And you asked him where the van was, and he said I parked it by the lake. I figured I was too drunk to drive, right?

A Correct.

Q Okay. And then you said I asked him if he had been drinking down at the lake or if he had been drinking intoxicants after his left his apartment. And he replied twice no.

A Correct.

Q You would agree that's kind of a compound question, wouldn't you?

A That question was asked separately of each other, those two questions.

Q So your report is inaccurate as to what you -- the question you asked him.

A I wouldn't say my report is inaccurate. I would say my report indicates the questions that were asked and the response provided by Mr. Mitchell.

Q And you went on to indicate that Gerald then told you he had consumed alcohol down by the lake; is that right?

A Later on in my investigation.

Q Sure. How much later in your investigation?

[187] ATTORNEY HABERMAN: Judge, I'm going to object at this point. It's a hearsay statement.

THE COURT: Well, I think it's a reasonable question. The question essentially is when did he tell you he was drinking. That's reasonable.

THE WITNESS: Can you repeat the question?

BY ATTORNEY WINGROVE:

Q Sure. I'll start back up. He did eventually tell you he was drinking down by the lake, right?

A He had changed his story, yes.

Q And how far into the conversation with him were you when he said that?

A I believe this was closer to my squad car.

Q Okay. And when you were speaking with Mr. Mitchell was he coherent?

A Somewhat, yeah. He was sometimes hard to understand, but he was understandable.

Q Somewhat coherent, somewhat not, right?

A Yes.

Q And was he belligerent?

A At that specific time, no.

Q You arrested Mr. Mitchell at 4:26, correct?

A Yes.

Q And if I told you that I've reviewed the DVD of your interview of Mr. Mitchell in front of the **[188]** squad car and it lasts seven minutes and 23 seconds, do you have any reason to dispute that?

A Can you repeat the question?

Q Sure. You interviewed Mr. Mitchell in front of the squad car, by the squad car, correct?

A Yes.

Q That was recorded, correct?

A Some of it was, yes.

Q Yeah. And if I told you we reviewed that DVD of that interview and it lasts for seven minutes and 23 seconds, you'd have no basis to dispute that, would you?

A If that was what was on the video, no.

Q Now, you didn't have Mr. Mitchell perform field sobriety tests, did you?

A I had asked him to.

Q And he declined, correct?

A Several times.

Q Sure. And that was sort of indicative of the whole discussion by that point, wasn't it? It was kind of adversarial?

A I'm not sure what you mean.

Q Okay. Why do you typically conduct field sobriety tests?

A To gain information based on standardized field **[189]** sobriety tests and known indicators of intoxication, assisting in making arrest decision.

Q And that's because you need probable cause to arrest somebody, right?

A Yes.

Q So you ask Mr. Mitchell if he was drinking alcohol by the lake after he left his apartment, correct?

A Yes.

Q Okay. Did you ask him if he went back to his apartment after he left the lake?

A No.

Q So for all you know as you sit here today Mr. Mitchell drove down to the lake, parked his van, had something to drink, walked back to his apartment, drank something in his apartment, and then went for another walk and was walking around the corner through that alley when public safety officer or the community service officer first became aware of him?

ATTORNEY HABERMAN: Judge, I would object. He's assuming facts that aren't in evidence. He's speculating.

ATTORNEY WINGROVE: I'm asking him what he knows. I'm also reading from page 22 of the transcript of the preliminary hearing.

[190] THE COURT: Let me look at page 22.

ATTORNEY WINGROVE: If the Court would prefer I could go into the series of broken down questions on page 23.

THE COURT: That's okay. You can repeat the question. That's in the preliminary hearing transcript, and it was asked.

BY ATTORNEY WINGROVE:

Q So for all you know as you sit here today he drove down to the lake, meaning Mr. Mitchell, parked his van, had something to drink, walked back to his apartment, drank something in his apartment, and then went for another walk, and was walking around somewhere north of Eighth Street when you became aware of him.

A There's a possibility.

Q Now, there was some time when you were knocking on his apartment door, correct?

A Yes.

Q And nobody answered, correct?

A Correct.

Q But when you went to talk to Mr. Mitchell he was really hostile, wasn't he? That's what you testified to, preliminary hearing transcript page 23, lines 22 through 23.

[191] A I attempted contact at his residence, and there was no answer.

Q I'm just going to read this. (As read) "You said he was really hostile when you went to talk" --

THE COURT: You should give the page and the line number.

ATTORNEY WINGROVE: I'm sorry, Judge. I know I should do that.

BY ATTORNEY WINGROVE:

Q Page 23, lines 23 through 24. (As read) "You said he was really hostile when you went to talk to him. He didn't like the officers.

"ANSWER: Okay."

Is that correct?

A Yes.

Q So actually your interactions with Mr. Mitchell were he was hostile, they were unpleasant, pretty much from the beginning according to what that just said.

A Who's they?

Q Referring to your interactions with Mr. Mitchell.

A Okay. I'm not understanding your question. I apologize.

Q Okay. I'm sorry. Let me try to reask the [192] question. Reading from the transcript, you said --

THE COURT: Can I interrupt? Rather than repeating the preliminary hearing testimony, you should ask him what his testimony is today. And then if you need to use the prelim testimony to counter that you can. But you should get his impression as of today.

BY ATTORNEY WINGROVE:

Q Okay. When you first went to talk to Mr. Mitchell, was he hostile?

A Not immediately. Not until we started asking questions.

Q Okay. So when you first started questioning Mr. Mitchell he was hostile.

A Yes.

Q Okay. You've been trained in doing interviews with criminal suspects, correct?

A Yes.

Q Okay. And isn't one of the things that you do when you interview criminal suspects is ask them questions, the same question different ways?

A At times, yes.

Q And don't you look for inconsistencies in the answers?

A Yes.

Q And isn't that indicia perhaps that they're not **[193]** telling the truth?

A Potentially, yes.

Q Isn't that really what your training suggests if there's significant inconsistencies?

A Yes.

Q Now, did you do some follow-up with the hospital? I'm sorry. Did you do some follow-up with Sheboygan Memorial Hospital regarding Gerald Mitchell?

ATTORNEY HABERMAN: Judge, I'm going to object. It's going to be, one, beyond the scope of today's trial, and two, there's not relevance.

THE COURT: What's the relevance, Mr. Wingrove?

ATTORNEY WINGROVE: Well, the State asked questions about intoxication and what was the source of the intoxication. The officer testified it was most likely alcohol. And this is going to suggest that it was a combination of other things.

ATTORNEY HABERMAN: Judge, I'm still not sure he's going to get the answer in. It's a hearsay statement.

THE COURT: Do you anticipate that he's going to testify as to his own knowledge or what somebody else told him?

ATTORNEY WINGROVE: He's going to testify **[194]** that it was at some later date that he went to interview Gerald Mitchell at the Sheboygan County Detention Center on 6-15-13 -¬

ATTORNEY HABERMAN: Judge, I don't want Attorney Wingrove to recite what he thinks Officer Jaeger's going to testify about 'cuz then that gives apparently all the information that he wants the jury to hear already in there.

THE COURT: Well, if he conducted another interview with Mr. Mitchell, and that's what I think he's getting at, I think that's relevant.

BY ATTORNEY WINGROVE:

Q I'm looking at page 5 of 9 of a report that you prepared. And it says (as read), "On 6-15-13 upon

returning to work I, Officer Jaeger, found Gerald Mitchell had been incarcerated" --

ATTORNEY HABERMAN: Judge, I'm going to object. There's not a question yet. He can't read just from a report. He's got to ask him a question, and we got to go from there.

ATTORNEY WINGROVE: I'm going to ask him if that's correct.

THE COURT: He's asking a question.

BY ATTORNEY WINGROVE:

Q (As read) "On 6-15-13 upon returning to work I, **[195]** Officer Jaeger, found Gerald Mitchell had been incarcerated in the Sheboygan County Detention Center." Is that -- that's in your report; is that correct?

A Yes.

Q I'm going to read another part of the report next page. (As read) "The hospital indicated that he had been released from their mental health facility to the Sheboygan Police Department on June 6, 2013." Is that correct?

A Yes.

Q After the blood draw was made, do you have any information as to what happened to Mr. Mitchell? He stayed in the hospital, correct?

A Yes he did.

Q And he went -- do you know which ward he went to?

A I believe it was the ICU, or Intensive Care Unit.

Q Any understanding as to why?

ATTORNEY HABERMAN: Judge, I'm going to object. That calls for a hearsay response.

THE COURT: I'll sustain that objection.

BY ATTORNEY WINGROVE:

Q Do you remember what the weather was like on May 30th?

A I believe it was a sunny day. Wasn't inclement **[196]** really.

Q Was it warm? Was it hot?

A I don't recall if it was warm or hot. I remember it being a typical day in May.

THE COURT: So it was snowing?

BY ATTORNEY WINGROVE:

Q So is it your testimony today that you believe when you first spoke to Gerald Mitchell he wasn't being honest with you?

A That's correct.

ATTORNEY WINGROVE: No further questions. Thank you.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Officer, did the demeanor and behavior of Mr. Mitchell change throughout your course of observations of him?

ATTORNEY WINGROVE: I'm going to object. That's already been asked and answered. He went

from being something, and then as soon as the officer started questioning him he became hostile.

THE COURT: I assume that this is going to lead to something, so I'll overrule the objection.

THE WITNESS: Can you ask again?

[197] BY ATTORNEY HABERMAN:

Q Sure. During your contact with the defendant did his demeanor change at various points?

A Yes.

Q You indicated on -- when Attorney Wingrove asked you on cross-examination that at the specific time in front of the squad car he was not being belligerent to you. Was he belligerent at other points?

A Yes.

Q When was that?

A During my initial contact with him when I began asking questions. He was belligerent towards both officers.

Q And when you first were speaking to him, was he in any sort of restraints at that point?

A No.

Q Was there any indication that you had pulled out any sort of weapons on your duty belt or handcuffs in any way at that point?

A Nothing.

Q And was there anything -- were you with Officer Fickett at that time?

A Yes.

Q And did you as officers surround him in any way or [198] try to corral him in any way?

A No. It was pretty much our standard positioning. We have, like, the number one position, number two position, number three position, things like that where officers are -- if I'm in direct contact or officer or I'm making contact with somebody, I'm typically standing in front of that person facing them with my gun sideway standing at just a slight angle to them for officer's safety reasons. And the other officer is typically off to the side of me.

Q Would this have been the general positioning of you, Officer Fickett, and the defendant when you first elicited some statements from him?

A Yes.

Q And that's the statements about driving down and parking his car down there.

A Yes.

Q When he made additional statements to you next to the squad car, what, if anything, had changed at that point?

A At that point he was in handcuffs based on his hostile behavior towards us, his inability to maintain his own balance, and the previous suicidal statements that were made. It's a concern for [199] others as well as the defendant as sometimes people that are suicidal also have other ill intent towards others.

Q So when he made -- when his story changed was he in handcuffs at that point?

A Yes.

Q And you had mentioned that you had a squad camera on your car that was recording some of your contacts with him.

A Some of it, yes.

Q Did it record everything?

A Not everything.

Q Tell me about that.

A When I first made contact I was across the street and out of view of the camera. Typically at that distance our remote microphones for the camera system that are affixed to the dash or the windshield area of our squads wouldn't reach that far. I can activate it remotely. However, it wasn't activated until I was preparing to ask the defendant to perform field sobriety tests.

Q And why would you have activated your camera at about the time you were going to ask him to perform sobriety testing?

A So that those tests could be displayed for the **[200]** courts as they were instructed and performed.

Q In this case though there were no field sobriety tests.

A Correct.

Q Attorney Wingrove gave you a time of seven minutes and 23 seconds about the time that was captured on a squad video. Had you watched your squad video prior to court?

A Yes.

Q And the 7:23, is that from the player counter or just kind of the time of watching the video?

A That I'm not sure.

Q Okay. And the squad camera itself, did it capture your entire contact with the defendant when you're next to the squad car or not?

A No.

Q Okay. So there would have been a longer time than seven minutes that you were actually talking to him at the squad car.

A Right.

Q When someone -- how are you able today, Officer, to recall exactly what the defendant said to you at the intersection when you first approached him even though that wasn't recorded?

A Based on my report and personal memory.

[201] Q What, if any, emphasis did you put on it in your report?

A Some quotations were actually used.

Q What's the purpose of using quotations?

A To mark specific statements made by the defendant that I felt useful in this case.

Q And do you put everything that someone says in quotations at all?

A No. Sometimes things are paraphrased.

Q Okay. And do you recall if you had actually quoted Mr. Swenson's statements in your report to indicate specific things that he exactly said?

A I don't recall specifically with Mr. Swenson.

Q Let me try to ask that in a better way as I think I asked you a bad question there. Do you

actually recall the specific quotes of Mr. Swenson, or do you generally recall what he said?

A I generally recall that.

Q In your report did you quote him, or did you not, or do you need to see your report?

A If I could see my report.

Q Sure. I'm going to just show you this briefly.

ATTORNEY WINGROVE: I'm looking at the report, Your Honor. There's no quotation marks around the sections of Mr. Swenson's statements that I read. We'll **[202]** stipulate there's no quotation marks on the report.

THE COURT: Mr. Haberman, what were you going to ask?

ATTORNEY HABERMAN: Well, I was going to ask that question. So I thank Attorney Wingrove for saving us a little bit of questioning there. I'll move on from that then.

THE COURT: Please.

BY ATTORNEY HABERMAN:

Q Officer, since Attorney Wingrove is willing to stipulate that there are no quotations in Mr. Swenson's statements to you in your report, did you ever mean to quote him?

A No.

Q Is your report indicative of exact phrases specifically that he said to you?

A Exact phrases, no.

ATTORNEY HABERMAN: Nothing further, Judge.

THE COURT: Anything new for recross?

ATTORNEY WINGROVE: A very few things, Your Honor.

RECROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q I'm looking at your report. And maybe you don't remember, but you write down some questions you **[203]** asked Mr. Mitchell. I don't see quotations marks around those either. Do you believe they would be there? Do I need to show you your report, or perhaps the State can stipulate.

A What questions would you be referring to?

Q Page 3 and page 4.

ATTORNEY HABERMAN: Well, Judge -¬

ATTORNEY WINGROVE: Page 4 top -¬

ATTORNEY HABERMAN: Judge, I will agree that the quotes about Mr. Mitchell's statement, this is not quoted. I asked if he had been drinking out at the lake or if he had been drinking intoxicants after his left his apartment, and he replied twice. That's all not in quotations. But the response --

THE COURT: Well, I think you got to let Mr. Wingrove ask a question before -¬

ATTORNEY HABERMAN: I'm just agreeing -- I'll stipulate so he doesn't have to show him the report.

THE COURT: I don't know where he's going.

BY ATTORNEY WINGROVE:

Q Okay. Was it more or less five minutes from the time you first saw Mr. Mitchell to the time you moved him over to the front of your squad car?

A I would say more.

Q How much more?

[204] A Maybe a little over ten minutes, maybe ten minutes.

Q About ten minutes it's fair to say?

A I would think so.

Q Okay. And how long did you have Mr. Mitchell by the squad car before you activated your recording system?

A I don't recall specifically.

Q Five minutes?

A Couple minutes, sure.

Q Couple. A couple. Is a couple three or is a couple five? What does it mean to you?

A Three to five.

Q Now, you said Mr. Mitchell was more cooperative by the squad car when you're making the recordings, right?

A Yes.

Q Okay. And you repeatedly asked him if he had had anything to drink before he drove, right?

A Right.

Q And he repeatedly said no.

A Right.

Q One last question please. I'm sorry about the exhibit number, but it's the statement from Mr. Swenson. Going to hand you what's been marked Exhibit 2. I'm not going to refer to anything **[205]** that's been written on Exhibit 2, but generally speaking, is that form familiar to you?

A It's a voluntary statement form we typically issue and ask people to complete.

Q Sure. And it identifies the witness and the officer that took the statement, correct?

A Yes.

Q And what officer took the statement please?

A Officer Fickett.

Q And it has his officer number on it, right?

A Yes.

Q And do you have any reason to dispute that that's what happened?

A No.

ATTORNEY WINGROVE: Thank you. No further questions.

THE COURT: Okay. Thank you, sir. You can step down.

ATTORNEY WINGROVE: I would ask that number 9 be received, Your Honor, if I haven't asked that already.

THE COURT: You already moved it in, but it's received.

ATTORNEY WINGROVE: Sorry.

THE COURT: That's all right. And Mr. Haberman, your next witness.

[206] ATTORNEY HABERMAN: I'll call Officer Dustin Fickett please.

THE COURT: Does anybody need a break, or can we keep going before our afternoon break? Everybody is okay?

ATTORNEY HABERMAN: Maybe for scheduling, Judge, I anticipate Officer Fickett and the next officer to be pretty quick.

THE COURT: All right. Thank you.

ATTORNEY WINGROVE: I would concur with that.

**** OFFICER DUSTIN FICKETT, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and spell your last name.

THE WITNESS: Dustin Fickett, F-I-C-K-E-T-T.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Fickett, how are you employed, sir?

A A police officer with the City of Sheboygan.

(Witness pouring cup of water.)

Q How are you employed, sir?

A A patrol officer for the City of Sheboygan Police.

Q And how long have you been a police officer for?

A Here just under three years.

[207] Q Do you have other law enforcement experience?

A Yes. About six months with the Department of Natural Resources.

Q And were you a DNR ranger?

A Yes.

Q And that's a -- in the same vein of law enforcement?

A Yes it is.

Q Do you have any training on identifying and detecting individuals who might be under the influence of alcohol?

A Yes I do.

Q And generally describe that for the jury.

A A lot of it just comes down with standard field sobriety testing that you have in the technical college system. And that's just simply states of intoxication such as things of the normalcy of smell of intoxicants, you know, the odor of the breath, and then glossy eyes, redness in the eyes, and just the typical behavior, could even be their slurred speech.

Q During the course of your employment how frequently do you come in contact with individuals who are under the influence of alcohol?

A I don't want to say all the time but quite often.

[208] Q And in your life experience have you also in your personal life experience, not on the job, have

you also come in contact with people who are under the influence of intoxicants?

A Yes.

Q And what signs have you typically seen beyond the ones that you've kind of mentioned already?

A Sure. I think for a lot of people it really affects their motor skills for the most part. Your talking, balance, simply walking, even behavior.

Q What do you mean by behavior?

A You know, alcohol obviously affects people in a different way. Some get either very sad, some get very hyper, some get moody. I've seen that as different effects. I guess it's just from person to person.

Q So is it safe to say that everyone doesn't act the same when they're intoxicated?

A Yes.

Q Directing your attention to May 30, 2013, were you working that day?

A I was.

Q And did you assist Officer Jaeger, who's seated to my right here, in an investigation involving Gerald Mitchell?

[209] A Yes.

Q What assistance were you to provide?

A Initially came out as a check welfare call. I came out to simply try to locate Gerald.

Q And eventually what did you do?

A When I first arrived to check the area for Gerald also there was a description of a Caravan that he possibility might have left in. I searched the entire area around where the reporting person called from. Couldn't locate it.

And then when I went back by Officer Jaeger's position, we overheard from a community service officer that a gentleman ultimately being Gerald was having problems walking, troubles with his balance, and we thought based on the information that could be him.

Q Did you ultimately make contact with this individual?

A Yes.

Q And prior to doing that did you assist Officer Jaeger in interviewing any individuals?

A No.

Q Okay. When you made contact with this male individual, did you identify him?

A Yes. Before I initially went there we have a **[210]** computer system that allows us to bring up their information. For Gerald I had a previous booking photo, so I was able to do that.

Q And did you -- the person you made contact with on the street do you see in court today?

A Yes I do.

Q Can you identify him for the Court by what he's wearing and where he's seated please?

ATTORNEY WINGROVE: I'll stipulate yet again that the officer could identify Gerald Mitchell as Gerald Mitchell.

ATTORNEY HABERMAN: Thank you.

BY ATTORNEY HABERMAN:

Q Officer, what, if anything, did you notice about his demeanor?

A Initially when we first came around the corner I observed Gerald having difficulty walking, difficulty holding his balance. Seemed like he was bothering some people. I don't know if there was a funeral that day, but a lot of people were drawing their attention to him, kind of wondering what was going on. And I observed that.

Q And did you get closer to the defendant?

A Yes.

Q What, if anything, did you notice about him [211] further?

A As we got closer we obviously became concerned about is he going to fall over, is he going to hurt himself. I was actually able to hold onto Gerald, and as we walked him back out of the roadway to the sidewalk, you know, being within inches from him, that's when I first smelt the odor of intoxicants.

Q Could you quantify or qualify that odor at all?

A Usually with intoxicants if there's a lot, I mean, it's a strong, strong odor. If you just have a couple, in my experience that we've dealt with people you typically can't smell it. But in this case it was strong.

Q At your initial contact with the defendant were you present during any sort of questioning of the defendant?

A I don't exactly remember the questioning that we first had with him. I just pretty much stood by - ¬my job was pretty much holding him up while Officer Jaeger completed his pat-down. And later on when we walked him back to the squad car, my job was as safety officer is pretty much to stand back, allow Officer Jaeger to do his questioning, and just to make sure nobody else interfered.

Q And did you ultimately get directed to collect a [212] statement or to assist further?

A Yes.

Q And whom, if anyone, did you go have contact with?

A The reporting person. I just can't recall his name.

Q Did you ultimately obtain a written statement from that person?

A Yes.

Q I'm going to show you what's been previously marked as Exhibit 2. Do you recognize that?

A Yes.

Q And what is that?

A That is a written statement completed by Alvin Swenson, along on the bottom my name and my badge number as a witness for collecting it.

Q And is this the person that you're referencing a moment ago?

A Yes.

Q And when you collected the statement from him did you actually talk to him and elicit responses from him?

A No.

Q What did you do?

A Pretty much went up, and typically when we give someone a voluntary statement form, the first [213] question is are you familiar how to fill these out? And he said he was. And I gave him the form to complete.

Q And did you tell him to put anything specifically in the statement?

A No.

Q And did you -- you then obtained the statement from him?

A Yes.

Q And ultimately did you have any further contact with Mr. Swenson that day?

A After collecting the statement, no.

Q When you had the opportunity to speak to Mr. Swenson -- I'm sorry -- you didn't really speak to him, but when you had that opportunity to have that interaction with him and that statement, did you notice any signs that he might be intoxicated?

ATTORNEY WINGROVE: Objection -- never mind. I'll withdraw the objection.

THE WITNESS: I really wasn't looking at him for any of those.

BY ATTORNEY HABERMAN:

Q Okay. And later on in Officer Jaeger's investigation did you provide additional assistance?

[214] A Yes.

Q And what -- where did you provide that assistance?

A At Aurora Memorial Medical Center.

Q And what, if any, assistance did you provide?

A I came up a couple minutes later after Officer Jaeger arrived, and immediately he was drawing my attention to the car. He was saying that Gerald went limp, was unresponsive but breathing, so I immediately ran inside to get a wheelchair in order to bring Gerald in to get help.

Q What observations did you make about him?

A When I came back, same thing as Officer Jaeger described to me. He wasn't moving. He wasn't responsive. We actually had to assist by physically picking him out of the back of the squad car and place him in the wheelchair. And then even on the wheelchair it was difficult keeping his legs from hitting the ground, constantly had to lift them back up, put him back in the wheelchair. Didn't want him to hurt himself.

Q Officer, in your experience not only with your life experiences but also as a -- on the job, have you seen anyone pass out from alcohol?

A Yes.

Q Did you make -- in that scenario when you have made [215] those observations in the past, was anything consistent or inconsistent with your observations of Mr. Swenson [sic] at this point?

A I guess the one interesting thing was typically in that we've had scenarios as well we do the sternum rub. I don't know why, but it always seems to work. And that was something we tried doing even to wake him up. And even in that time he didn't wake up from it. He just pretty much stayed unresponsive.

Q Just so I guess I understand. You're not able to indicate at all why he was unresponsive.

A No.

Q Okay.

ATTORNEY HABERMAN: Nothing further, Judge.

THE COURT: Cross-exam?

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q You mention the sternum rub a minute ago.

A Yes, sir.

Q And you -- I thought I saw you put, must have been your right hand and hold it where -- about over your solar plexus?

A It was my left hand.

Q Your left hand?

[216] A Yes, sir.

Q Over your solar plexus or higher up?

A Just really much on the bottom of the ribs around the stomach area. Give a large area rub.

Q And it's -- and you've had OWI arrests where people pass out?

A Not OWI, sir.

Q Okay. You've had situations where people have passed out due to alcohol intoxication, correct?

A Yes.

Q And then you apply the sternum rub. Does that generally cause them to wake up or not?

A You know, it's a toss-up. Sometimes it does, sometimes it doesn't.

Q How often does it in your experience?

A I've only used it maybe about half a dozen times, sir, and maybe only half of those times.

Q Did you ever do any follow-up with any of those times to see whether the presentation was more complex, perhaps it was poly drug abuse or something like that?

A No, sir.

Q When you spoke to Alvin Swenson -- did you speak to Alvin Swenson?

A No, sir.

[217] Q You just gave him the form?

A Yes, sir.

Q You didn't ask him if he was familiar with it?

A That would be the only question, yes.

Q Okay. Did you say anything about you need to be truthful when you answer these?

A No, sir.

Q And you've been trained in interviewing criminal suspects, correct?

A Correct, sir.

Q And isn't one of the techniques used is to ask the same question over again in different ways?

ATTORNEY HABERMAN: Judge, I'm going to object because of the relevance here.

THE COURT: I'll overrule the objection.

THE WITNESS: Can you repeat the question please?

BY ATTORNEY WINGROVE:

Q Sure. Isn't one of the techniques used in ascertaining whether a suspect is being truthful is to ask them the same question over in different ways?

A I was not taught that technique, sir.

Q Okay. Were you taught to ask the same question over in different ways?

[218] A No, sir.

Q The same question the same way?

A No, sir.

Q Do you look for inconsistencies in somebody's story when you determine whether they're telling the truth or not?

A I look for inconsistencies, yes, but ultimately we hope for the truth in the end.

Q Yes we do. Thank you.

ATTORNEY WINGROVE: I'm done.

THE COURT: Any redirect?

ATTORNEY HABERMAN: No. Thank you.

THE COURT: Officer Fickett, thank you.

And your next witness please?

ATTORNEY HABERMAN: The other officer's grabbing Officer Stephen. The State will call Officer Christopher Stephen.

**** OFFICER CHRISTOPHER STEPHEN, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and '

spell your last name.

THE WITNESS: My name is Christopher Stephen,

S-T-E-P-H-E-N.

THE COURT: Go ahead please.

[219] DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Officer Stephen, how are you employed?

A By the City of Sheboygan as a police officer.

Q And how long have you been a police officer for, sir?

A Just over a year-and-a-half.

Q And have you received any training regarding photographing as part of your training to become a police officer?

A Just general training at the law enforcement academy.

Q Okay. And directing your attention to May 30, 2013, were you working?

A I was.

Q And as part of your training at the police academy do you have any training regarding accident investigations?

A I had a course on motor vehicle accidents, and we had different scenarios regarding damage to vehicles and things of that nature, yes.

Q Did you assist Officer Jaeger on May 30, 2013, in an investigation involving Gerald Mitchell?

A I did.

Q What was your assistance that you were to provide?

[220] A Officer Jaeger had asked dispatch to have an officer check the area for a vehicle. It would have been a van, I believe the license plate was 404-BTN, that may have possibly been involved in a welfare check slash traffic complaint that he had been working on.

Q Did you ever locate the actual vehicle?

A I did.

Q Where did you locate it?

A I located it in the 400 block of St. Clair Avenue.

Q And did you communicate this via your radio to the officer?

A I did. I'm not sure if I communicated it over the radio or over cell phone, but I did have contact with Officer Jaeger and informed him where it was located.

Q And did you receive any direction from Officer Jaeger as to what to do next?

A Yes. He had mentioned something regarding a possible accident and that he was conducting an investigation. I photographed the vehicle and also looked for intoxicants inside the vehicle.

Q Did you locate any intoxicants inside the vehicle?

A No.

Q And how did you look inside the vehicle?

[221] A Just with my eyes walking around the vehicle as I was looking for damage. I didn't open up any doors or anything of that nature.

Q Officer, I'm going to show you two exhibits previously marked Exhibits 4 and 5. Look at each of them individually. And do you recognize those?

A Yes.

Q What is Exhibit 4?

A Exhibit 4 would be the front of the van in question.

Q And that's a photograph of the van.

A Correct. Photograph of the front driver's side.

Q And what's Exhibit 5?

A Exhibit 5 would be a photo that I took from the rear depicting the driver's side of the vehicle.

Q I'm also now going to show you Exhibits 10, 11, 12, 13, and 14.

ATTORNEY WINGROVE: Might I be allowed to see those before you present them to the officer?

ATTORNEY HABERMAN: Sure. Sorry.

ATTORNEY WINGROVE: Thank you.

BY ATTORNEY HABERMAN:

Q Officer, I'll show you those same exhibits I just talked to you about. Can you identify Exhibits 10 through 14?

[222] A (Reviewing documents.) Yes.

Q And what are they in total?

A They're various photos of the vehicle in question that I took on said date and time.

ATTORNEY WINGROVE: Just so the record's clear, I have no objection to 10 coming in. 11 through 14, if this is going where I think it's going, I'm going to be objecting as to foundation.

THE COURT: Well, let's see where it's going.

BY ATTORNEY HABERMAN:

Q Officer, these are pictures that you took on May 30th?

A They are.

Q And these are the -- this is the vehicle that you located.

A Correct.

Q And what's the license plate of the vehicle?

A It's a Wisconsin registration 404-BTN.

Q And you took a picture specifically of that registration?

A I did.

Q And that's exhibit what number?

A That's Exhibit 10.

Q What are depicted in the other exhibits that I handed you, 11 through 14 generally?

[223] ATTORNEY WINGROVE: I'm going to object.

THE COURT: Let's have a sidebar.

(Brief discussion held outside the hearing of the jury.)

THE COURT: Go ahead, Mr. Haberman.

BY ATTORNEY HABERMAN:

Q Officer, after you had taken photographs of the vehicle, what, if anything, did you do next in your investigation?

A I looked for an object or vehicle that the vehicle in question could have struck.

Q Did you locate anything?

A I did not.

Q And did you move the vehicle in any way?

A No.

Q Describe how it was parked.

A It was parked on the north side of St. Clair Avenue in the 400 block more towards the east towards the dead end. It was facing westbound.

Q And that location -- we actually have a big map here, Exhibit 9. I'm going to ask you come up off the witness stand and just walk up here and indicate if you can where the vehicle was located. And if there's any markings on the map that help you make your determination let me know.

[224] A It would be located -- I believe it would be located either right here or right here. I'm not -- I would just assume right in this general area, I guess, just before the 400 block of St. Clair Avenue.

Q Hold up again where you're indicating so I can describe. For the record you're using your pen to point to actually where there is a kind of a blue mark on the map. You see that?

A Yes.

Q There's a blue drawing on that map right next to the word St. Clair Avenue?

A Right.

Q And is that a pretty fair and accurate depiction of roughly where the vehicle was?

A Yes.

Q And is that in walking distance of the beach there and the lake?

A I believe that there's a ramp or a staircase that goes down to the lake there, yes.

Q Okay. And so that -- so does that road end right there at the turnaround?

A It does. It's kind of elevated, on a elevation, I guess.

Q In the nearby area just around the vehicle -- you **[225]** can have a seat. Thank you, Officer. In the nearby area surrounding the vehicle, did you notice any cans or bottles of alcohol?

A No.

Q Anything in the street nearby or anything?

A No.

Q Okay.

ATTORNEY HABERMAN: Nothing further then.

THE COURT: Cross-exam?

ATTORNEY WINGROVE: Very briefly.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q You said there was a turnaround. In fact, that just comes to a blunt end at St. Clair Avenue at the lake, doesn't it?

A Right. You could turn around at the dead end if you wanted to. It's a dead end.

Q Sure. And the parked -- the car -- the van was parked next to the curb appropriately, right?

A Correct.

Q And whoever drove there -- you weren't present when the van was parked, right?

A No.

Q But even though you weren't there, you know that whoever did that had to execute some sort of turn **[226]** to turn the van around or else it would have had to back it down St. Clair being the direction it was parked, right?

A One would assume so.

ATTORNEY WINGROVE: No further questions. Thank you.

* * *

[243] ATTORNEY WINGROVE: Thank you. The defense calls Gerald Mitchell.

**** GERALD MITCHELL, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

[244] COURT CLERK: Please state your name and spell your last name.

THE WITNESS: My name's Gerald Mitchell,

M-I-T-C-H-E-L-L.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY WINGROVE:

Q Drawing your attention to May 30, 2013, how were you doing that day?

A That was a terrible day for me.

Q Why? What was going on?

A I was quite depressed. I lost a job earlier in the week.

Q Were you on any medications?

A Yes.

Q What?

A Alprazolam and amitriptyline and others for my blood pressure.

Q The medicines you mentioned by name, why were you prescribed -- you were prescribed those medications, right?

A Yeah. For depression.

Q How were they working for you on the day in question?

A Not too well. Not at all.

[245] Q What does that mean?

A I know in hindsight they weren't working at all.

Q Were they influencing your moods?

A Yeah.

Q How?

A Well, they didn't relieve me of my depression, so I felt depressed.

Q Did they influence your thoughts? Were they not --

A Excuse me?

Q What were you thinking of?

A I was thinking of ending the mental anguish that I was going through.

Q So you developed a plan to kill yourself.

A Yes, sir.

Q And what was your plan?

A To take my medications in my pocket and a fairly large drink down to the lakefront and go there to die in peace.

Q And these medications, they had warnings, do not consume with alcohol, right?

A Yes.

Q At some time did you go down to the lake?

A Yes.

Q Before you went down to the lake, did you consume any beverage alcohol on that day?

[246] A No.

Q So when you went down to the lake, what did you do? How did you get to the lake?

A I drove my mother's van from my residence down to the end of the street that I live on. And I walked down --

Q Let me interrupt for a second. You drove down St. Clair, right?

A Yeah.

Q Did you just park your van, or did you turn your van around? Your mother's van, I'm sorry.

A Yeah. I did a Y-turn at the end of the dead end and parked behind the car that was right in front of my mother's vehicle.

Q And you remember all this, right?

A Yes.

Q And is it fair to say your meds were influencing your ability to remember to some extent?

ATTORNEY HABERMAN: Judge, I'm going to object. It's a leading question.

THE COURT: I'll sustain the objection.

BY ATTORNEY WINGROVE:

Q Was there anything influencing your ability to remember what happened on the day in question?

ATTORNEY HABERMAN: Judge, I'm going to **[247]** object again. He's given the answer in the question he just asked.

THE COURT: I'll overrule the objection.

THE WITNESS: What was the question again, sir?

BY ATTORNEY WINGROVE:

Q Was there anything influencing your ability to remember what was going on on the day in question?

A Yeah. One of the medications that I have definitely affects my ability to remember things.

Q How? How did it affect your ability to remember things? Does it make it better? Does it make it worse?

A It makes it worse. I can't remember a lot of things.

Q Okay. So you park your car -- I'm sorry -- your mother's van on St. Clair. What happens next?

A I walk down to the lake with my drink, a mixture of vodka and Mountain Dew. Continuing down to the lake, I took pills, drank them with my drink. These were my medications.

Q Now, when you say you drank, that was a mixture of vodka and Mountain Dew, correct?

A Yes.

Q And do you know whether it was -- was it less than **[248]** a liter of vodka?

A Yes.

Q About how much vodka do you think it was?

A Maybe half of a liter.

Q Okay. And did you sip it, or did you drink it on down?

A I pounded it.

Q Okay. What happened after that? Did you take the pills?

A Yes, I took all the pills that I brought with me.

Q About how many different pills?

A In the two different medications approximately 40.

Q About how many of each of those pills would you take on a given day if you took them as prescribed?

A One of the medications and maybe four on a bad day.

Q Okay. What happened next?

A I finished the drink, and I ran into the water.

Q What happened next?

A The water was freezing, so I went back to the beach to lay down.

Q Then what happened?

A I said my prayers and prepared to die.

Q Then what happened?

A I got a warm feeling, and I don't remember anything after that.

[249] Q Okay. You've seen copies of photographs of your mother's van that had been presented today as exhibits, correct?

A Yes.

Q Is that consistent with your recollection of where you parked the van?

A Yes.

Q Okay. And you've watched a DVD of your interview with the police on Eighth and St. Clair, correct?

A Yes.

Q And that lasted for about 7:23, correct?

A Yes.

Q Seven minutes, 23 seconds. I'm sorry.

A Yes.

Q You don't know how you got there, do you?

ATTORNEY HABERMAN: Judge, objection. is a leading question again. It's his witness --

BY ATTORNEY WINGROVE:

Q Do you know how you got there?

A After seeing the video I realized I walked there. I don't remember it.

Q Now, when you reviewed the video, you were adamant that you didn't have anything to drink before -- okay. When you reviewed the video, did you take a position as to whether you had anything to drink **[250]** before you drove down to the lake?

A Yes.

ATTORNEY HABERMAN: Judge, you know, I understand that -- when it keeps happening, Judge, he's giving the answer, and then he's asking the question in an open-ended way.

THE COURT: Well, I will object -- I'm sorry -- I'll sustain the objection to the form of the question. I didn't think the form was proper. When you make reference to your position when you viewed the video, I don't know what that means.

BY ATTORNEY WINGROVE:

Q Yesterday you reviewed the DVD of your interrogation by Officer Jaeger, correct?

A Yes.

Q Did you take a position in that interrogation as to whether you drank before you drove down to the lake?

A Yes.

ATTORNEY HABERMAN: Judge, I'm going to object -¬

THE COURT: I'm overruling the objection.

THE WITNESS: Yes.

BY ATTORNEY WINGROVE:

What did you say?

[251] A I drank while I was down at the lake in two different quantities at two different times.

Q And the officer asked you if you drank before you drove down to the lake, right?

A Yes.

Q And what did you say?

A No. I don't drink when I drive.

Q Do you recall the -- whether or not the officer told you that other people had seen you drinking?

A No.

Q We've already asked this. It's going to be my last question. Before you drove down to the lake on the day in question, did you have anything to drink?

ATTORNEY HABERMAN: Judge, I object again. As Attorney Wingrove said asked and answered.

THE COURT: I'll let it stand as a summary question.

THE WITNESS: No, sir.

ATTORNEY WINGROVE: No further questions.

THE COURT: Cross-exam?

CROSS-EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Swenson, isn't it true that you've been convicted of a crime before?

A I am not Mr. Swenson.

[252] Q I'm sorry. I apologize for that. Mr. Mitchell, isn't it true that you've been convicted of a crime before?

A Yes.

Q And how many times have you been convicted?

A Four.

Q And that would be within the last ten years. A Yes.

Q Attorney Wingrove asked you on direct examination about you reviewing the squad video that was provided to you as part of this case, right?

A Yes.

Q And you had an opportunity to watch that.

A Yes.

Q And do I understand your testimony that on direct examination you acknowledged having admitted you drank two different quantities down at the lake?

A Yeah. Two different quantities I told him two different times. First time I said two shots. The second time I said maybe possibly four.

Q So just to be clear, when the officer asked you had you been drinking at the lake, according to what you saw on the video, you acknowledged, yes, now I was drinking at the lake, right?

A Yes.

[253] Q And then he asked you how much did you have to drink, and you ultimately came to the number of about two shots, right?

A The first time.

Q And after that it was kind of established that it was vodka.

A Yes.

Q You would agree that a short time later in the video he asked you again to be honest with him, right?

A Yes.

Q And then he asked you how much did you have to drink, and you gave a response that you had four shots, about four shots then.

A That's correct.

Q Okay. And again, we're talking about vodka.

A Yes.

Q What type of vodka do you typically drink?

ATTORNEY WINGROVE: Objection. Relevancy.

ATTORNEY HABERMAN: Judge, it's going to go to his alcohol concentration and his intoxication level.

THE COURT: I'll overrule the objection.

THE WITNESS: A typical 80-proof vodka.

BY ATTORNEY HABERMAN:

Q Okay. Do you have a brand?

[254] A No.

Q Okay. Fair enough. Anything available that's on the shelf, or do you have a -- or do you just not remember?

A I don't remember.

Q Okay.

A That day? No.

Q All right. Where did you make your drink?

A In my apartment.

Q All right. And what did you use specifically to make your drink?

A Like, a large tumbler cup.

Q Okay.

A And I used a can of Mountain Dew and a good bit on the bottom of the bottle, the end of my bottle of vodka.

Q Okay. When you -- tell me about this tumbler glass. Give me a size if you can. Maybe use your hands to gesture. How tall is the cup?

A Like this (indicating).

Q So for the record, Mr. Mitchell has his hands on the witness stand kind of describing a distance between his hands --

A Eight inches.

Q About eight inches he says. And that looks to be **[255]** about right. And about what would be the kind of diameter if you can give me this with your -- actually the circumference with your hands if you can.

A Four-and-a-half inches (indicating).

Q At the top or the bottom?

A At the top. Bottom is smaller.

Q So the bottom gets a little smaller.

A Yeah.

Q Do you know how much alcohol -- I'm sorry -- do you know how much liquid that that glass holds all the way full?

A Between 20 and 30 ounces.

Q And how do you know that?

A Just by judging what a 20-ounce bottle would do. I just put a can in with 12 ounces. The rest was vodka.

Q Okay. So --

A I may not have actually put the vodka in first, and I just poured the soda on top of it till it filled up. I don't know if I emptied the can or not, so.

Q Okay. You remember specifically using a can of Mountain Dew though and not a bottle of Mountain Dew.

A Yes.

[256] Q We're not talking about a two liter. We're not talking about a 20-ounce. We're talking about a normal 12-ounce can.

A Yes.

Q And you had to open it – it's a fresh can. You had to open it, right?

A Right.

Q And when you poured it in there, do you remember any weight to what was left in the can? Do you remember if there was anything in it? Or don't you remember at all?

A Yeah. No. I don't remember actually. But like I said, I had – would add the can after the vodka.

Q Okay. So you add the vodka first. And you said that it was what's left of the bottle.

A Right.

Q What was remaining. What's the bottle -- not the brand 'cuz I agree or you explained you don't remember it, but what's the size of the bottle of vodka that you poured it from?

A I guess what they call a fifth.

Q A fifth. Okay. Describe the bottle for us if you can. Give me a size estimation for me.

A Maybe three-and-three-quarter inches. Three-and-a-half to four inches round.

[257] Q Three-and-a-half to four inches round. About how tall?

A This tall (indicating). Approximately 14 inches, 15 inches maybe.

Q I guess I don't understand what you mean when you say a fifth I guess. Can you describe it any other way?

THE COURT: Well, a fifth is a size of a bottle. It's a size of a liquor bottle. I assume that's what he's referring to.

ATTORNEY HABERMAN: Right. I guess I'm trying to get the picture of what a fifth looks like in my mind that he had there. And I just -- I guess I'm just asking him to clarify a little further.

THE COURT: I mean, a fifth is a fifth is a fifth. I don't know how much more clear it's going to be.

THE WITNESS: It's a typical bottle of vodka.

BY ATTORNEY HABERMAN:

Q Okay. Do you know how much you poured into that glass?

A No.

Q Is your original statement -- excuse me -- is one of your statements of two shots accurate in terms of how much you poured in there?

A No.

[258] Q Is your statement about four shots pouring in there, is that accurate?

A More accurate, yes.

Q Okay. If I say six shots, are we even more accurate, or are we going in the wrong direction now?

A It's probably -- it depends the size of the shot. I don't -- I wasn't measuring.

Q Absolutely. And that's why I guess I'm just trying to get an idea here of what exactly or how

many exactly you put in there. Do you think you put more than six in?

A Could have.

Q Okay. Nine?

A No. I don't think so.

Q Okay. When you went from -- when did you make this drink?

A It was probably quarter to three.

Q And you have a specific recollection of that?

A Yeah.

Q Is there anything that jumps out as to why quarter to three stands out to you? Did you look at a clock around that time? Is there something that stood out to you?

A No, nothing really stood out to me. That was just **[259]** an estimate.

Q Okay. And that's fair. When did you make a phone call to your mom to say goodbye?

A Maybe a little after that.

Q Okay. So you made -- do you specifically recall making the drink first and then calling your mom?

A My memory is a little fuzzy because the amount of medication that I took at the lake, so.

Q Okay.

A You know, it didn't just affect my memory after taking it. It also affects my memory before taking it because it's memory as a whole.

Q Sure. And if you say you don't remember or you're not sure, that's okay.

A I'm not sure.

Q Okay. You do recall calling your mom and saying goodbye though.

A Yeah.

Q All right. Do you recall Mr. Swenson coming over to see you?

A Yeah.

Q Isn't it true that you first saw him when you were at the top of your stairs and he was at the bottom of those interior stairs?

A Yeah.

[260] Q And isn't it true that you had a trash bag?

A Mm-hmm.

Q Yes?

A Yeah.

Q And isn't it true that he actually didn't ascend those stairs to get any closer to you.

A That's true.

Q And isn't it also true that you saw him on the phone?

A Yeah.

Q And he told you he was on the phone with his sister -- I'm sorry -- not his sister, your sister.

A Yeah.

Q Would you agree that you were in an agitated state?

A Yes.

Q Would you agree you were not nice to him?

A Yes.

Q You heard Mr. Swenson testify today that he knew who you were, you know, he knew you but didn't really know you in a long-term any sort of relationship or friendship. Is that a fair characterization of the relationship that you and Mr. Swenson had?

A Yes.

Q You guys knew of each other, and that was about it.

[261] A That's it.

Q So at that point you really had no reason to be angry at Mr. Swenson for anything he did.

A No.

Q Okay. Isn't it true that you then came down the stairs and he left?

A Yes.

Q Isn't it true that you ultimately took that bag of garbage out to your parking lot?

A Yes.

Q And isn't it true that you had a conversation or -- let me backup. Isn't it true that Mr. Swenson was not standing outside in your parking lot area when you did that garbage?

A Yeah. He was, like, in a different parking lot with pavement.

Q Okay. So you recall him still being outside on the ground level when you took the garbage out.

A What are you getting at?

Q What I'm just trying to do is see if I can understand the chronology of events here. So you agree you took out the garbage, right?

A Yeah.

Q All right. When you took the garbage outside to that spot where the garbage is in the parking lot **[262]** area of your apartment, was -- do you recall Mr. Swenson outside?

A I don't recall.

Q Okay. So you're not sure where exactly he was at that moment.

A Right.

Q Do you recall getting into the van after that?

A Yeah.

Q Do you recall not having anything else in your hand at that time?

A I had my drink in my hand.

Q Okay. Did you go back upstairs to get your drink?

A No.

Q Did you have your drink the whole time?

A Yeah. I brought it down when I threw the trash out.

Q Okay. So when you were at the top of the stairs you had your drink in your hand and you had the trash bag in the other.

A Yeah.

Q Okay. You're certain.

ATTORNEY WINGROVE: Objection. Asked and answered.

THE COURT: It's cross-exam. It's a fair question.

[263] THE WITNESS: No, I'm not certain.

BY ATTORNEY HABERMAN:

Q Okay. Do you specifically recall going back upstairs to get your drink, or no?

A I don't recall.

Q Okay. When -- can you see from up there Exhibit 1, which is this first map we were using. Can you see that?

A Yes.

Q All right. Were you able to see at any point during today the markings that Mr. Swenson made on the map?

A Yeah. I took some time to come around and view that.

Q Okay. Is his diagram of where your van was, is that accurate --

A Yes.

Q -- inaccurate, or don't you recall?

A Yeah, it's accurate.

Q When you left St. Clair, or this address where it was parked, how did you get out, and where did you -- which way did you go?

A Well, I did a "U" -- not a U-turn but a Y-turn in my parking lot and went out the alley back behind my place.

[264] Q Towards Seventh or Eighth?

A Actually toward Erie south.

Q Erie, would you agree, is down here at the bottom of Exhibit 1.

A Right. That's south.

Q So is your alley -- you went this -- where did you go if you can recall?

A I did a Y-turn, or a U-turn, just turned around.

And right underneath that larger red box there's an alleyway that goes to Seventh Street. That's the direction I went. So east.

Q Okay. So you went to Seventh Street, on the alley towards Seventh Street.

A Yes.

Q So you didn't stay back here and go onto Erie.

A No.

Q Sorry. I think I misunderstood you then. So from Seventh you go, what, to St. Clair?

A Yeah.

Q Do you go somewhere else?

A No. Just to St. Clair and went down to, like, Third where it ends.

Q Okay. And ultimately this Exhibit 9 where we had an officer mark on here where the van was found, you would agree that's accurate?

[265] A That's where I parked.

Q And do you recall specifically walking down that larger flight of stairs to the beach?

A Definitely.

Q Did you have your drink in your hand at that time?

A Yes.

Q Are you certain of that?

A Yes.

Q Just to be clear, you have a specific recollection of that, right?

A That was the moment of truth.

Q Okay. And you're talking about because of the suicidal -- that was going to be the time that --

A Yes, sir.

Q Okay. Did you have a cap for this drink at all? A cap for your -- a lid for your cup.

A I may have left it in the car.

Q So you do recall having a lid for the cup.

A Yeah.

Q Okay. Did it have a straw too?

A No.

Q All right. You recall using the lid to get from inside your apartment into your car then down to the end of St. Clair.

A Yeah.

[266] Q Is it possible that you spilled at all on the steps on the way down?

A Not with the lid.

Q Okay.

A Some may have came out, like, where there's a straw little "X" mark.

Q Okay.

A But not much.

Q Do I understand that when you're talking about spilling, you didn't spill much, if anything, and that was because of the stairs in your house or the stairs near the beach?

A The stairs in the house.

Q Okay. When you're walking down the stairs at the beach, did you spill anything?

A No. I stood still for a bit while I got the pills out of my pocket and took them in probably four different little handfuls.

Q Okay. So your consumption of the pills and the drink happened at the top of the stairs or at the bottom of the stairs near St. Clair --

A By the lake? Yeah, by the lake. Towards the top.

Q Okay. So it doesn't sound right that you would have walked down the stairs and spilled anything. That couldn't have happened 'cuz it was gone [267] already.

A Yeah. Couldn't have is a stretch. Could have. Could have. But I don't remember spilling anything.

Q Okay. But you do recall taking those -- that drink and the medication up there.

A Very much.

Q About how long did it take you to get down to the spot on St. Clair?

A Three minutes maybe. Three minutes.

Q Okay. If Mr. Swenson's written statement says that at 2:55 he got a phone call from your family about the concern which prompted him to go over to see you, does that sound about right for timing?

A Yeah.

Q And you would agree that you're probably down at the lake maybe somewhere around 3:15 or longer?

A Even -- maybe even before that.

Q Okay. Any substantial time before that?

A I don't know. Maybe 3:10, 3:05.

Q Okay. Right around there.

A Yeah.

Q Okay. Did you have any ice in your glass?

A No.

Q You take alprazolam and what was the other name of **[268]** the medication?

A Amitriptyline.

Q And do either of those affect your judgment?

A Yes.

Q Okay.

A They're a psychoactive drug from what my doctor told me.

Q That's what they're supposed to do.

A Obviously not doing the job they're supposed to.

Q Okay. During that day you said you had taken those medications, right?

A Yes.

Q And you still were feeling depressed, so they weren't working.

A Yes.

Q Do you recall how many specific pills you put in your pocket?

A No.

Q Can you give an estimate?

A Of the both different pills, 30 to 40.

Q Okay. Would that have been all of your pills, or would that have been some of the pills?

A It wasn't all of them.

Q Okay. You don't recall a specific -- you don't recall walking back to the area of Eighth and **[269]** St. Clair, correct?

A Correct. That medication that I took works fairly quickly. One of the medications does, the alprazolam.

Q You had been taking that though prior to the actual moment of truth as you said.

A Not in an overdose.

Q But were taking them --

A Yeah, for years. Twenty years.

Q Okay. Do you recall telling the officer that you had been drinking at your residence before driving?

A No.

Q Do you recall telling the officer that you were too drunk to drive?

A I don't remember that.

Q Okay.

A 'Cuz I was on my way back, and I don't remember any of it.

Q Do you recall being placed in handcuffs?

A No.

Q Do you recall any particular officer being there? Let me ask this way. Do you recall this officer being there?

ATTORNEY WINGROVE: I'm going to object. Asked and answered. He's already testified he didn't **[270]** remember anything that happened at that point.

THE WITNESS: Yeah, I don't remember.

THE COURT: He answered the question.

BY ATTORNEY HABERMAN:

Q Do you recall Officer Jaeger asking you to submit to field sobriety tests?

A No. I did see the video though.

Q Okay. So do you recall the response that you gave when he asked you?

A Not in my brain. Not in my memory. I remember seeing the video.

Q Okay.

A And I just refused.

Q Is it accurate to say that you said you have skinny ankles and that's why you couldn't do the test?

A Yes.

Q And that's what you saw in the video?

A Yes.

Q Isn't it true that you told him that on more than one occasion that's why you couldn't do the test?

A It's on the video. I don't recall that.

Q Okay. Do you recall watching it on the video on more than one occasion you said you have skinny ankles and you can't do the test?

A Yeah. I just deferred and said just give me the [271] breath test. That's the same thing. From what I remember of the video.

Q You've been around people that have been drunk before, haven't you?

A Yes.

Q Would you agree that you -- when you watch the video, when you heard the way you talked, that was consistent with someone who had been highly intoxicated?

A I was really intoxicated.

Q So you would agree that that's consistent with one who's really intoxicated.

A Oh yeah.

Q And you would agree that on the video you can see a little bit, not much, but a little bit of your inability to balance and stand straight.

A Little bit, yeah.

Q Okay. You would agree that you eventually went maybe -- I don't know the best way to use here -- maybe unconscious or not responsive in the back of

the squad car. You would agree you could see that on the video at some point.

ATTORNEY WINGROVE: I'm going to object. Best evidence rule. If he wants to question Mr. Mitchell about what's on the video, he can just show the video.

[272] THE COURT: Well, I'm not sure it's a very important point. So Mr. Haberman, why don't you just move on.

ATTORNEY HABERMAN: I will, Judge.

BY ATTORNEY HABERMAN:

Q Mr. Mitchell, how much do you weigh today?

A Today?

Q Yeah.

A A hundred 60.

Q What did you weigh back in May?

A Hundred 45.

Q Okay. And you recall how much you had to eat that day?

A No.

Q You recall having any sort of meal that day?

A No. I was just pretty depressed. I don't remember if I ate or not.

Q Okay.

A Probably not if I was depressed. Like I said, my memory had been affected by that amount of medication that I took.

Q What did you do with your cup?

A I believe I may have thrown it down by the beach.

Q Do you recall that or not?

A Yeah. Actually I do. I'm a litterbug.

[273] Q Did you strike anything with your vehicle on the way down to St. Clair?

ATTORNEY WINGROVE: Objection. Relevancy.

THE COURT: Sustained.

ATTORNEY HABERMAN: Judge, it would go to --

ATTORNEY WINGROVE: If we want to have a sidebar, I would be happy to approach.

THE COURT: I've already ruled.

ATTORNEY HABERMAN: Nothing further, Judge

THE COURT: Redirect?

ATTORNEY WINGROVE: Very brief.

REDIRECT EXAMINATION

BY ATTORNEY WINGROVE:

Q Where do you buy your vodka? Do you remember where you bought it?

A No.

Q Typically where would you buy vodka?

A Maybe Piggly Wiggly.

Q Okay. You go to Piggly Wiggly, and typically there's three sizes of bottles on the shelf, correct? There's a big --

A Yeah.

Q Do you know what the big one's called?

A No, but it's got to be close to, like, a half gallon.

[274] Q Okay. Then there's another one. Usually it's about half the size of that. Do you know what that one's called?

A That's a fifth.

Q Okay. And then there's one just a little bit smaller than that. Do you know what that one's called?

A Yeah. That's, like, a hundred 75 --

Q No, I'm talking about on the shelf. 'Cuz don't they usually put the small bottles in back so people won't steal them?

A Well, there's an intermediate that might be found on the floor that -- you're thinking of a pint. I can pretty much tell that. But there's also a quantity that's real close to a liter.

Q Sure. And that was the size of the bottle?

A No. It was a fifth.

Q Okay. So you understand the difference between a fifth and liter.

A Sure.

Q And how much of that fifth did you pour into that cup, half the bottle, more or less?

A It was a little less than half.

Q Okay. A lot more than half or just a little less than half? Or you don't remember?

[275] A Well, I don't know what a lot and a little less than a half is.

Q Okay. When you saw the video of the interview by Jaeger, you concede you're intoxicated, correct?

A Yes.

Q What were you intoxicated by?

A The medication I had taken at the lake and the drink that I had taken that with.

Q And then you spent a period of time at the hospital?

A Yeah. I was in a coma for a day-and-a-half.

Q And then at Behavioral Health?

ATTORNEY HABERMAN: Judge, I'm going to object. Relevance now.

THE COURT: I think we're getting beyond the scope of cross-exam.

ATTORNEY WINGROVE: I'm done.

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